IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-514

DOROTHY ANNETTE ABNEY,
Petitioner,

v.

JAMES HAROLD ABNEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Indiana

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Writ	11
The Indiana Supreme Court's Holding Is Contrary to Consistent Holdings by This Court and Violates the Full Faith and Credit Clause of the United States Constitution	11
The Narrow Issue in This Case Has Not Heretofore Been Determined by This Court	17
The Indiana Court of Appeals' Holding Is Contrary to Consistent Holdings by This Court and Violates Petitioner's Right to Procedural Due Process	18
Conclusion	21
Appendix A	A-1
Appendix B	A-17
Appendix C	A-18
Appendix D	A-20
Appendix E	A-28
Appendix F	A-30
Appendix G	A-41
Appendix H	A-43
Appendix I	A-46

Table of Cases Cited

Caulder v. Durham Housing Authority, 433 F. 2d 998 (4th Cir., 1970), cert. denied, 401 U.S. 1003 (1971) 19, 20

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir., 1961), cert. denied, 368 U.S. 930 19

Garrett v. United States, 340 F. 2d 615 (Ct. Cl., 1965) .. 19

Goldberg v. Kelley, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) 18, 19

Harding v. Harding, 198 U.S. 317, 325 S. Ct. 679, 49 L. ed. 1066 (1905) 11

In re Steinfust, 133 Cal. Rptr. 341 (C.A. 1976) 19

Kniffen v. Courtney, 148 Ind. App. 358, 266 N.E. 2d 72 (1971) 11

Lambert v. Lambert, 229 Ark. 533, 316 S.W. 2d 822 (1958) 13

Michael v. Michael, 253 N.E. 2d 261 (Ind., 1969) 12

Morris v. Jones, 329 U.S. 545, 67 S. Ct. 451, 91 L.Ed. 488 (1947) 13

Reihl v. Reihl, 60 So. 2d 35 (Fla., 1952) 13

Shelley v. Kraemer, 355 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) 18

State ex rel. Gruenoch v. Miller, 212 Ind. 147, 8 N.E.2d 245 (1937) 12

Miscellaneous Cited

4 A.L.R. 2d 107 13

74 A.L.R. 2d 828 (1960) 14

Indiana Code Section 31-1-11.5-3 3

Tennessee Code Annotated Section 36-802 ..... 4, 5

28 U.S.C. 1257 (3) 2

28 U.S.C. Section 1738 ..... 3, 13

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To the Supreme Court of Indiana

Dorothy Annette Abney hereby petitions the Court for a writ of certiorari to review the judgment of the Supreme Court of Indiana in this case.

OPINIONS BELOW

The Opinion of the Indiana Court of Appeals is reported at 374 N.E. 2d 264 (1978) (App. A, *infra*, pp. A-1-A-16). The Order of the Indiana Supreme Court, denying Dorothy Annette Abney's Petition for Transfer from the Indiana Court of Appeal's decision, is not and will not be reported. (App. B, *infra*, p. A-17).

JURISDICTION

The judgment of the Indiana Court of Appeals was entered on March 27, 1978. Petitioner's timely petition for rehearing was denied on April 20, 1978. Petitioner's timely Petition for Transfer was denied by the Indiana Supreme Court on July 10, 1978. The jurisdiction of the Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the Courts of Indiana should have given full faith and credit to the Decrees of the Probate Court of Davidson County, Tennessee, dated May 25, 1964, which granted to Petitioner an award of separate maintenance; July 21, 1969, which held that Respondent's contempt of court barred him from asking the court to grant an absolute divorce to his wife; and April 16, 1975, which found Respondent's contempt of that court to be continuing and restrained him from taking any further action in any other jurisdiction.

2. Whether Petitioner can be denied procedural due process of law by the Marion County, Indiana, Circuit Court's failure to consider any of the incidents of the parties' marriage as a requisite to the granting of a dissolution to Respondent.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 4, Section 1 of the Constitution of the United States provides:

> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be provided, and Effect thereof."

Article 14 of the Amendment to the Constitution of the United States provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

28 U.S.C. Section 1738 provides as follows:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exist, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

Indiana Code Section 31-1-11.5-3 provides in pertinent part as follows:

> "There shall be the following causes of action:
>
> (a) dissolution of marriage which shall be decreed upon a finding by a court of one of the following grounds, and no other:
>
> (1) Irretrievable breakdown of the marriage."

Tennessee Code Annotated Section 36-802 provides in pertinent part as follows:

> Provided, hoewever, that the circuit, chancery or such other court specially empowered to grant divorces shall also have the power to grant absolute divorces to either party where there has been a final decree of divorce from bed and board, or of separate maintenance for more than two (2) years, upon a petition being filed by either party that sets forth the original decree for divorce from bed and board, or separate maintenance, and that the parteis have maintenance, and that the parties have not become reconciled. The court granting the absolute divorce shall make a final and complete adjudication of the support and property rights of the parties. However nothing in this paragraph shall preclude the divorce forum from granting an absolute divorce before the two (2) years has expired.

STATEMENT OF THE CASE

The judicial proceedings of the State of Tennessee have been seriously ignored, violated, and abused by the Courts of Indiana. The Indiana Courts gave relief to the Respondent who had been found in contempt of the Tennessee Courts while such contempt was continuing. The proceedings of the Courts were as follows:

On May 25, 1964, the Probate Court of Davidson County, Tennessee, entered a decree of separate maintenance, ordering Respondent to pay $300.00 per month (App. C, *infra*, pp. A-18-A-19). On appeal, the Court of Appeals of Tennessee, Middle Section, in an unreported opinion, modified the decree by reducing said payments to $260.00 per month.

On October 23, 1967, Respondent filed another petition in the Probate Court of Davidson County, Tennessee, alleging that

the parties had lived under the decree of separate maintenance for more than two (2) years and that they had not and could not become reconciled. Respondent prayed that either the Respondent or the Petitioner be granted an absolute divorce pursuant to *Tenn. Code Ann.* §36-802. The Probate Court dismissed the action, and the Respondent apealed to the Supreme Court of Tennessee. The Court held, in an opinion report at 222 Tenn. 160, 433 S.W. 2d 847 (1968) that the Probate Court had no authority to award the husband a divorce. However, the Court ruled that the decree awarding the wife separate maintenance could be changed to award the wife an absolute divorce. The case was remanded for further proceedings (App. D, *infra*, pp. A-20-A-27).

The Probate Court of Davidson County, Tennessee, after a hearing on March 25, 1969, held on July 21, 1969, that support should be increased from $260.00 to $375.00 per month. Further, the Probate Court held that because the Respondent was in contempt of court for non-payment of support in the amount of $1,160.00 and because the Respondent had never made any attempt to purge such contempt, Respondent was barred from asking the Probate Court to grant an absolute divorce to the Petitioner pursuant to *Tenn. Code Ann.* §36-802, and, therefore, that Respondent's petition should be dismissed (App. E, *infra*, pp. A-28-A-29). The Court of Appeals of Tennessee, Middle Section, on March 26, 1970, in an opinion reported at 61 Tenn. App. 531, 456 S.W. 2d 364 (1970), affirmed the Probate Court's decision (App. F, *infra*, pp. A-30-A-40). The court held that the trial judge was justified in refusing to hear the petition of Respondent because of his previously adjudged, unexplained and unpurged contempt of court. Further, the Court noted several findings of fact as follows:

> Defendant protests bitterly that he is immured in the thralldom of enforced celibacy as deplored in Lingner v. Lingner, 165 Tenn. 525, 56 S.W. 2d 749 (1932). This may

be true, but, according to the testimony of the parties, it is defendant who is unwilling to cohabit with his wife, rather than the reverse. In this repect, celibacy of defendant is voluntary, rather than enforced.

Furthermore, the freedom to legally cohabit with a partner of choice, as desirable as it may be, is not the sole consideration in the preservation or dissolution of the bonds of matrimony. The present case is an outstanding exception to the pronouncements of Lingner v. Lingner.

The limited record before this Court at this time portrays the defendant as a member of the Armed Forces who, having married and been divorced from a previous wife, married the complainant herein and produced two children. In 1964, the complainant obtained the initial relief of separate maintenance, presumably because of misconduct of defendant. Defendant completely ignored the orders of the court until the intervention of a Member of Congress and representations from his superiors brought about some compliance. Defendant has sought an absolute divorce in another state. Said application is still pending, and complainant has been burdened with the expense of retaining counsel to resist said application.

Complainant is now afflicted with a severe form of crippling arthritis for which she receives extensive medical attention and treatment without charge from facilities of the armed forces. This free service would terminate upon the termination of the marital relation between complainant and defendant. Complainant testifies that she has been ever ready and still is ready for reconciliation with defendant. Defendant testifies that a reconciliation is impossible.

It is difficult to conceive how a trial judge could be reversed for declining to pronounce an absolute divorce under such circumstances. 456 S.W. 2d at 368.

On October 8, 1974, Respondent instituted a proceeding in the Circuit Court of Marion County, Indiana, for dissolution of his marriage to Petitioner. Petitioner then filed a Motion to Dismiss contending that the court lacked subject matter jurisdiction, personal jurisdiction, and that venue was improper. Respondent filed an Objection to the Motion to Dismiss, and the Court overruled Petitioner's Motion to Dismiss. Thereafter, Petitioner filed a Motion for Change of Venue to which Respondent objected; the Court overruled the Motion for Change of Venue.

On January 24, 1975, Petitioner filed her Answer to Respondent's Petition and in such Answer she asserted that the court lacked jurisdiction of the subject matter and person, and the venue was improper.

On January 29, 1975, Petitioner filed Interrogatories and a Motion to Reduce Time to Answer such Interrogatories; such motion was granted. On March 6, 1975, Respondent filed answers to Petitioner's Interrogatories.

On May 5, 1975, Petitioner filed a Motion to Dismiss based upon an Order of the Probate Court of Davidson County, Tennessee, dated April 16, 1975 (App. G, *infra*, pp. A-41-A-42), restraining Respondent from taking any other action in any other jurisdiction in pursuit of a dissolution of marriage with Petitioner. The Court overruled such Motion.

The hearing on Respondent's Petition for Dissolution of Marriage was held on May 15, 1975, and an order entered on July 29, 1975 (App. H, *infra*, pp. A-43-A-45). At the conclusion of said hearing, the Trial Court entered findings of fact as follows:

> The Court further finds that the respondent is entitled to a money judgment against the petitioner in the sum of $10,390 for past due support and maintenance payments as ordered by the Tennessee courts.

The Court further finds that it is economically impossible for the petitioner to provide the medical care which would be beneficial to respondent; however, the parties having been legally separated for approximately thirteen years, it is unconscionable to enslave petitioner to a marital relationship which is clearly irretrievably broken.

The Court further finds that respondent would be eligible for Medicaid benefits if she has no other assets; the Court further finds that such insurance coverages which are presently in effect because of the marital relationship are not property rights.

The Trial Court ordered the marriage dissolved and entered a judgment against Respondent for arrearage in support in the amount of $10,390.00, an obvious recognition and finding by the Indiana Trial Court that the contempt found in the Davidson County Probate Court had continued until the time of trial in Indiana. In addition, the finding of the Indiana Trial Court that "it is unconscionable to enslave Petitioner to a marital relationship" is directly in conflict with the Tennessee Court of Appeals finding that "defendant . . . is unwilling to cohabit with his wife, rather than the reverse. In this respect, celibacy of defendant is voluntary, rather than enforced." 456 S.W. 2d at 368.

The case was appealed by Petitioner to the Court of Appeals of Indiana, Second District. After an adverse judgment because of the lack of a verbatim statement of the dissolution decree in Petitioner's brief and appeal to the Indiana Supreme Court, and an Order of the Supreme Court remanding the case to the Second District Court of Appeals for review on the merits, the Court of Appeals on March 27, 1978, affirmed in written opinion the granting of a dissolution to Respondent. Petitioner's brief cited four (4) reasons why the judgment of the Circuit Court should be overturned.

1. The Circuit Court failed to give full faith and credit to the Decrees of the Probate Court of Davidson County, Tennessee;

(a) dated May 5, 1964, which granted to Petitioner an award of separate maintenance; (b) July 21, 1969, which held that Respondent's contempt of court barred him from asking the court to grant an absolute divorce to his wife; and (c) April 16, 1975, which found Respondent's contempt of that court to be continuing and restrained him from taking any further action in any other jurisdiction.

2. The Circuit Court failed to recognize the Doctrine of Comity.

3. The Circuit Court failed to exercise its inherent equitable discretion to deny Respondent's Petition for Dissolution.

4. The Circuit Court denied Petitioner procedural due process by failing to require a full examination of the incidents of the parties' marriage as a requisite to the granting of a dissolution.

The Petition for Rehearing was filed on April 14, 1978, and denied on April 20, 1978 (App. I, *infra*, p. A-46).

Petitioner filed a timely petition for transfer from the Court of Appeals to the Indiana Supreme Court on May 9, 1978. Such petition was denied on July 10, 1978 (App. B, *infra*, p. A-17).

Petitioner's timely raising of the Federal issues is obvious from all the opinions and decisions in this case. First, before even entering an appearance in Indiana, Petitioner filed a motion to dismiss for lack of subject matter jurisdiction. Further, the errors complained of occurred at trial in the Circuit Court of Marion County, Indiana. Petitioner at trial urged consideration of all the incidents of the marriage; however, the Judge considered only evidence of irretrievable breakdown. Petitioner assigned such refusal to consider the incidents of the marriage as reversible error, stating that such refusal was a denial of procedural due process. Further, despite Petitioner's strenuous con-

tentions that any judgment rendered by the Indiana Court would deny full faith and credit to the three Tennessee decrees, the Circuit Court entered its decree dissolving the marriage. Petitioner claimed such was reversible error, stating that the Circuit Court's failure to accede to the three decrees of the Probate Court of Davidson County, Tennessee, was a denial of full faith and credit to Petitioner. The Records and Judicial Proceedings in Tennessee found Respondent in contempt, unexplained and unpurged. They further found that Petitioner's crippling arthritis treatment without charge from the armed services facilities would terminate upon termination of the marital relationship.

REASONS FOR GRANTING THE WRIT

The Indiana Supreme Court's Holding Is Contrary to Consistent Holdings by This Court and Violates the Full Faith and Credit Clause of the United States Constitution

Indiana, obviously, is compelled to follow the dictates of the full faith and credit clause, and it has recognized this compulsion in *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E. 2d 72 (1971).

Generally, the granting of a decree for separate maintenance or divorce in one state cannot be used as grounds in another state. *See* Harding v. Harding, 198 U.S. 317, 325 S. Ct. 679, 49 L. ed. 1066 (1905). The parties separated on January 18, 1964. The separate maintenance decree was entered on May 25, 1964. Mr. Abney in his petition to the Circuit Court of Marion County, Indiana, stated that the parties were separated on May 25, 1964. Ever since such date, the parties have been living apart under that decree. *Harding v. Harding, Id.*, provides:

> "We are of opinion that the final decree of July 26, 1897, entered in the Circuit Court of Cook County, Illinois, in legal effect established that the separation then existing and which began contemporaneously with the filing of the bill in that cause in February, 1890, was lawful, and therefore conclusively operated to prevent the same separation from constituting a willful desertion by the wife of the husband." 198 U.S. at 340.

Here, it is obvious that the finding of "irretrievable breakdown" was based largely on testimony that the parties had not lived together since 1964; however, since such separation was judicially enforced, it would be a denial of full faith and credit to grant a divorce to Respondent *because of* the Tennessee decree for separate maintenance.

The Davidson County Probate Court's decree of contempt and later refusal to permit Respondent to proceed further with the litigation until such contempt was purged barred the Indiana Court from granting a dissolution, which dissolution it would have refused had such contempt been of an Indiana Court. A succinct statement of Indiana law is contained in the Indiana Court of Appeals' Opinion in the instant case: "A litigant who has been found in contempt by a Court of this State is not permitted to flout the judicial process and may be barred from proceeding further with his case until the contempt is purged." 374 N.E. 2d at 269. *State ex rel. Gruenoch v. Miller*, 212 Ind. 147, 8 N.E. 2d 245 (1937), states:

> "It has very generally been held that where a husband institutes an action for a divorce, and the court makes an order against him to pay support and suit money to enable the defendant to make her defense, and if he neglects or refuses to comply with the order, such disobedience will warrant the court in refusing to proceed with the case until payments are made as directed by the order." 8 N.E. 2d at 246.

Further, *Michael v. Michael*, 253 N.E. 2d 261 (Ind., 1969), a case which involved contempt by a husband in taking custody of a child in violation of a Trial Court's custody decree and wrongfully removing the child from the State, contains the following language:

> "Here we have the appellant in the defiant position of removing himself and the child from the state in violation of a court order and still requesting appellate review from this Court. We can hardly be expected to undertake review while appellant reserves to himself the power to place himself beyond the law and render wholly ineffectual any adverse determination we might make.
>
> Appellant leaves us with no alternative but to exercise the only available means of sustaining the effectiveness of our judicial process. Appellant has had ample opportunity to present an excuse for his flagrant disobedience or to return the child, but has not seen fit to purge himself. *One who has wilfully denied the mandate of a court cannot then compel the court to do his bidding.* In reaching the conclusion that we do, we have the support of the overwhelming majority of other jurisdictions that have been confronted with the problem. 253 N.E. 2d at 262 (emphasis supplied).

Thus, it is apparent that had Mr. Abney been in contempt of an Indiana Court he would have been denied relief in the form of the divorce. The failure of the Indiana Courts to accord the same effect to a decree of contempt issued by the Tennessee Courts is an obvious violation of full faith and credit. 28 U.S.C. §1738 reads as follows: *"Such Acts, records and judicial proceedings or copies thereof, so authenticated shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."* (emphasis supplied). It is apparent that the Tennessee decree of contempt was not given the same effect an Indiana decree of contempt would have been given and also was not given the same effect the Tennessee Courts had given it. This was an established equity by the Courts of Tennessee that was completely ignored by the Indiana Courts.

Further, an annotation at 4 A.L.R. 2d 107 states that whether a judgment of a sister state by which a divorce has been denied operates as a bar to another action for a divorce by the same Plaintiff depends upon whether the two suits are based upon the same cause of action. Considered here are identity of facts, issues, and subject matter. *See, e.g.*, Morris v. Jones, 329 U.S. 545, 67 S. Ct. 451, 91 L.Ed. 488 (1947), Reihl v. Reihl, 60 So. 2d 35 (Fla., 1952), Lambert v. Lambert, 229 Ark. 533, 316 S.W. 2d 822 (1958), et al. Here, the reason

why divorce should have been denied in Indiana is the same as the reason for denying in Tennessee—unexpurgated contempt. Here, the issue, subject matter, and facts are the same as they were in the denial to Respondent of a divorce in the Tennessee Court. This Indiana proceeding is, in effect, the same proceeding as was the earlier Tennessee proceeding.

Thus, the action of the Indiana Courts in allowing Respondent a divorce despite his contempt of the Courts of Tennessee denied full faith and credit to the Tennessee decree of July 21, 1969, which denied to Respondent a divorce because of contempt, which contempt is still unexpurgated.

The third judgment of the Davidson County Probate Court should also be accorded full faith and credit. Because the Tennessee Courts had priority of jurisdiction, the Indiana Courts were bound to recognize the restraining order of April 16, 1975. Many jurisdictions hold that an antisuit injunction will be given effect where the enjoined action was commenced after the suit upon the same cause of action in which the injunction was issued. *See, generally,* Annot., 74 A.L.R. 2d 828 (1960). Its rendering of a separate maintenance decree of 1964 and denial of a divorce to Respondent because of an unexpurgated contempt in 1969 established Tennessee as the state of primary jurisdiction. Because both the separate maintenance decree and the denial of a divorce to Respondent, separately, prevented Respondent from obtaining an Indiana divorce, Tennessee Courts should be viewed as having primary jurisdiction, and, therefore, its restraining order of April 16, 1975, *finding the continuing contempt,* should be honored by the Indiana Courts.

Because the Tennessee Courts had jurisdiction over the disposition of property and maintenance of Petitioner, as well as over the custody and support of the children, Tennessee Courts should be deemed to have final jurisdiction over the dissolution of the marriage, especially since dissolution would mean the cessation of the insurance proceeds, a property interest vital to the maintenance of Petitioner.

Finally, Indiana should deny Respondent a divorce out of good will to the Tennessee Courts. Respondent is in contempt of the Tennessee Court for non-payment of past due financial obligations. Tennessee has barred Respondent from getting a divorce because of such unexpurgated contempt; were Respondent an Indiana resident in contempt of an Indiana Court, he would also be so barred from proceeding in Indiana Courts. It is urged that Indiana should accord the same respect to Tennessee decrees as it does those of its own courts, not merely by incorporating into its decrees the debt of Respondent, but, rather, by barring Respondent from obtaining a divorce for his contempt.

The competing interests of the two litigants militate against the granting of the divorce to Respondent. Indiana does have an interest in protecting its citizens; Respondent cannot remarry until granted a divorce. However, Indiana does not have an interest in protecting its citizens from themselves. The Indiana Courts are not the last resort for Respondent; rather, he has had and still has an opportunity to petition the Tennessee Court for divorce after satisfying his adjudged obligations. There is no Tennessee decree which bars Respondent from instituting a divorce proceeding in Tennessee after purging his contempt. Conversely, Petitioner's interest is crucial; the granting of the divorce would deprive her of the proceeds of her husband's insurance policy, which proceeds are absolutely vital to her welfare. It must be emphasized again that Petitioner is 100% disabled and not physically competent to be gainfully employed. Further, it must be emphasized that the Veteran's Administration benefits help pay medical bills averaging between $5,000.00 and $10,000.00 per year, an amount the Indiana Trial Court found that the Respondent could not possibly pay.

Thus, because of the binding decrees of the Tennessee Court, because Tennessee has had jurisdiction over this case for over

fifteen years, because Indiana Courts would have barred Respondent from getting a divorce had the contempt been of an Indiana Court, because of Respondent's alternative means of obtaining a divorce, and because of Petitioner's interest in the existence of the marriage, the Court should out of deference and good will to the Courts and citizens of Tennessee, refuse to grant a divorce and defer to the judgment of the Tennessee Courts.

There is one final reason why the Indiana Courts should refuse Respondent a divorce. Not only was Respondent adjudged to be in contempt by the decree of July 14, 1969, such decree also ordered Respondent to pay $375.00 per month to Petitioner. Respondent admitted in open court that he had paid Petitioner only $245.00 per month for the last several years in contravention of the decree of July 14, 1969 and in further contempt of the Tennessee Courts. On appeal, the Tennessee Court of Appeals, Middle Section, stated:

> "It can hardly be urged that there is a 'statute of limitation' whereby a disobedient party may be purged of contempt by the lapse of time. The unexplained failure of a party to obey the orders of the court becomes more serious rather than less serious with continued non-compliance. Abney v. Abney, 61 Tenn. App. 531, 456 S.W. 2d 364, at 369 (1970).

The arrearage as of July 29, 1975, the date of the decree of the Marion County Circuit Court, was $10,390.00. Finally, Respondent has fallen further behind in arrearage since such decree. Petitioner urges this Court not to condone Respondent's egregious behavior by granting him relief, but rather to make Respondent accountable to the Tennessee Court by denying him relief.

Thus, it is clear that a granting of a divorce to Respondent by the Indiana Court was in violation of full faith and credit. This Court has consistently held that a binding ruling by a court of competent jurisdiction binds the courts of other states in the

absence of change to circumstances. Here, it is obvious that the principal issues—separation of the parties and Respondent's unexpurgated contempt—were the same in both Tennessee Courts and the Indiana Courts.

The Narrow Issue in This Case Has Not Heretofore Been Determined by This Court

Petitioner's principal contention is this: The Decree of the Probate Court of Davidson County, Tennessee, of July 21, 1969, which held that Respondent's contempt of court barred him from asking the court to grant an absolute divorce to his wife should have been accorded full faith and credit by the Indiana courts, because Indiana had itself such a rule and, further, because Respondent's contempt was unexpurgated at the time of the Indiana decree. Although, as shown above, this Court has made numerous rulings that *affirmative* defense of states are to be accorded full faith and credit, this Court has never squarely decided whether or not a *negative* ruling is to be accorded full faith and credit. Petitioner urges the Court to hold that the Davidson County Probate Court decree of July 21, 1969, barred the State of Indiana from entertaining Respondent's petition for dissolution, first because there was no change in circumstances from the 1969 Davidson County Probate Court decree and the decree of the Marion County Circuit Court, and, secondly, because Indiana did not accord to the Tennessee Court's refusal to entertain Respondent's petition the same full faith and credit such court would have accorded to an Indiana decree which refused to entertain Respondent's petition for unexpurgated contempt.

The Indiana Court of Appeals' Holding Is Contrary to Consistent Holdings by This Court and Violates Petitioner's Right to Procedural Due Process

At trial in the Circuit Court of Marion County, Indiana, Petitioner urged the Trial Court to exercise its inherent judicial discretion and refuse to grant the divorce to Respondent. Petitioner urged the Trial Court to hear evidence pertaining not just to "irretrievable breakdown" but also to the effect a divorce would have on Petitioner. However, the Trial Court refused. Petitioner contends that the absence of judicial discretion, the refusal of the Trial Court to consider the property rights especially when Respondent testified that he could not pay for the medical services Petitioner was receiving without charge from Armed Services facilities, and the incidents of the marriage, prevented Petitioner from receiving an effective hearing, contrary to the mandate of *Goldberg v. Kelley*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

The United States Supreme Court held in *Shelley v. Kraemer*, 355 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), that action taken by a state court on civil matters is nevertheless state action sufficient to require imposition of the Constitutional guarantees of due process and equal protection. There is no doubt, therefore, that the order of divorce is state action which must not deprive any individual of property without the substantive and procedural protections of due process.

The action taken by the Indiana Court in granting the instant divorce had the effect of reclassifying Petitioner. That reclassification denied her the status of wife. Petitioner is no longer the wife of Respondent under the laws of the State of Indiana. By depriving Petitioner of this "wife" status, the State of Indiana has placed Petitioner outside a classification established by the Veteran's Administration for determining who is entitled to certain Veteran's Administration benefits. Therefore,

to the extent that those Veteran's Administration benefits are the property of Petitioner, she has been denied that property by the summary action of the State of Indiana. The Indiana no-fault divorce statute did not afford Petitioner an adequate hearing or adequate procedural safeguards to protect property interests so important to the health and life of Petitioner.

The Veteran's Administration benefits received by Petitioner are properly within the meaning of the Fourteenth Amendment. The United States Supreme Court, concluding that welfare benefits could not be terminated prior to a due-process hearing, held that welfare benefits are property within the meaning of the due process claims. *Goldberg v. Kelley*, 397 U.S. 254, 90 S. Ct. 1011, 26 L. Ed. 2d 287 (1970). The court in *Goldberg v. Kelley* recognized that one's status had been and could be as important to the individual as his tangible property. Other decisions have recognized constitutionally protected property interests in one's status as a high school student. *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (5th Cir., 1961), *cert. denied*, 368 U.S. 930, as a retired governmental employee; *Garrett v. United States*, 340 F. 2d 615 (Ct. Cl., 1965) (government retirement annuity benefits could not be cut off without due process), as a resident in publicly subsidized housing; *Caulder v. Durham Housing Authority*, 433 F. 2d 998 (4th Cir., 1970), *cert. denied*, 401 U.S. 1003 (1971) (government housing could not be terminated, once provided, without due process), and as the wife of a man receiving Veteran's disability payments, *In re Steinfust*, 133 Cal. Rptr. 341 (C.A. 1976) (wife's rights in former husband's Veteran's benefits could not be cut off).

Goldberg v. Kelley, id., holds that in determining whether a hearing is constitutionally required and, if so, the extent of that hearing, the court must balance the interest of the state in providing a minimal hearing against the interest of the individual. Petitioner's interest in retaining the benefits which pro-

vide her with the medical care she desperately needs is certainly as strong as the interests in *Caulder, supra.* Indiana's interest in providing easy divorce procedures for its citizens is far overshadowed by the pressing medical needs of Petitioner for a life supporting property right. The no-fault divorce statute of Indiana does not provide adequate safeguards for the protection of the rights of indigents or of people like Petitioner. To the extent that such a procedural statute effects the Veteran's Administration benefits to Petitioner, it is unconstitutional.

Thus, the "irretrievable breakdown" statute of Indiana as applied by the Trial Court and the Court of Appeals is unconstitutional on its face. The Indiana court action denies the threshhold requirement of state action under the Fourteenth Amendment. Further, Petitioner was deprived of a valuable property right by the action of the Indiana Courts. Finally, such deprivation of property was not accomplished through a fair and meaningful hearing; no evidence as to the incidents of the marriage nor as to any factor except the mere presence of "irretrievable breakdown" was considered. In summary, the Indiana "irretrievable breakdown" statute *as applied* by the Indiana Courts in this case, contravenes the due process clause of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, for the reasons herein shown, this Petition for Writ of Certiorari should be granted. The circumstances of these parties occur each day in the United States. The enforcement of these rights of the Petitioner will prevent citizens from crossing state lines to escape adjudged family and marital responsibilities. The rights of such persons as Petitioner and the wrongs of such persons as Respondent, as established by a State Court, should be clearly enforceable throughout all the States.

Respectfully submitted,

ORTALE, KELLEY, HERBERT &
CRAWFORD

By: JOHN W. KELLEY, JR.

By: W. P. ORTALE
23rd Floor—Life & Casualty Tower
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Attorneys for Petitioner

APPENDIX

APPENDIX A

Dorothy Annette Abney, Appellant
(Defendant Below),

v.

James Harold Abney, Appellee
(Plaintiff Below).

No. 2-1275A382.

Court of Appeals of Indiana,
Second District.

March 27, 1978.
(374 N.E.2d 264)

Wife appealed from judgment of the Marion Circuit Court, J. Patrick Endsley, J., which granted divorce. The Court of Appeals, 360 N.E.2d 1044, affirmed. On remand from the Supreme Court, the Court of Appeals, Sullivan, J., held that: (1) neither considerations of comity nor full faith and credit required Indiana courts to refrain from exercising jurisdiction over the husband's petition even though, after the petition was filed, a Tennessee court enjoined the husband from maintaining a divorce action in Indiana, and (2) upon showing of irretrievable breakdown in the marriage, divorce was required to be granted even though the divorce would terminate the medical assistance which the wife was receiving through the husband's military benefits.

Affirmed.

1. Divorce Key 356(1)

Order of Tennessee court dismissing husband's petition, asking the court to grant an absolute divorce to his wife, because

of the husband's contempt presented nothing which could be given full faith or credit or be recognized as a matter of comity by Indiana trial court to preclude it from hearing husband's petition for divorce.

2. Judgment Key 815

If a state has the power, i. e. the jurisdiction, to grant a divorce as against a nonresident party, that power is not destroyed because an antisuit injunction has been issued by a sister state.

3. Judgment Key 815

Neither full faith and credit nor rules of comity require compulsory recognition of foreign antisuit injunctions. U.S.C.A. Const. art. 4, § 1.

Where a sister state enjoins a litigant from proceeding with a previously instituted action, the court in the forum state will usually refuse to recognize the injunction as a bar to disposition of the pending action, but this is not to say that priority of jurisdiction will be the dispositive factor in every case; the equities involved and other competing interests of the two jurisdictions should also be considered.

5. Courts Key 511

Courts of Indiana are bound to help enforce laws of sister states unless enforcement would result in a violation of Indiana law or injury to local citizens.

6. Divorce Key 82

Since the Tennessee court specifically dismissed the husband's petition for divorce, there was no action pending there which barred Indiana suit for dissolution of marriage, notwithstanding

Tennessee court's continuing jurisdiction with respect to its separate maintenance decree; hence Indiana was the first state to obtain jurisdiction over husband's request for dissolution of marriage so that neither full faith and credit nor comity required Indiana to refrain from exercising jurisdiction when the wife thereafter obtained from the Tennessee court an injunction against husband's dissolution action in Indiana.

7. Divorce Key 1

Husband and Wife Key 286

Suit for separate maintenance is for the purpose of enforcing the obligations of the marriage, whereas a suit for divorce is an action for dissolution of the marriage.

8. Husband and Wife Key 299(1)

Separate maintenance decree is ordinarily no bar to a later action for divorce.

9. Divorce Key 87.5, 108, 154

When petition for dissolution alleges irretrievable breakdown, key issue for the trial court's determination is whether there is a reasonable possibility of reconciliation; if a reasonable possibility of reconciliation exists, court may continue the matter and order the parties to seek reconciliation through counseling; if there is no reasonable possibility of reconciliation, the marriage is necessarily irretrievably broken, in which case the court must grant the dissolution. IC 31-1-11.5-8(a) (1976 Ed.).

10. Divorce Key 154

Although wife was suffering from medical condition which required costly treatment and although grant of divorce to husband would terminate assistance which wife was receiving through the

husband's military benefits, trial court, upon finding that marriage was irretrievably broken, was required to grant divorce to the husband. IC 31-1-11.5-3(a) (1976 Ed.).

11. Constitutional Law Key 277(1)

Fact that grant of divorce to husband would terminate medical assistance which wife was receiving as a result of the husband's military benefits and fact that finding of irretrievable breakdown of the marriage required grant of dissolution decree did not deprive wife of due process despite her contention that the medical assistance which she was receiving was a property right. IC 31-1-11.5-3(a) (1976 Ed.).

John T. Neighbours, Cadick, Burns, Duck & Neighbours, Indianapolis, William P. Ortale, Ortale, Kelley, Herbert & Crawford, Nashville, Tenn., for appellant (defendant below).

Richard A. Rogers, Morton, Tumbove, Rogers & Ruble, Indianapolis, for appellee (plaintiff below).

SULLIVAN, Judge.

The marriage of James Abney and Dorothy Abney was dissolved on July 29, 1975. In our initial response to the wife's appeal, we felt compelled to affirm the judgment because her brief did not contain a verbatim statement of the dissolution decree which we deemed crucial to a resolution of the issues she raised. Our opinion is reported at Ind.App., 360 N.E.2d 1044.

Thereafter the Supreme Court, on the wife's petition to transfer, concluded that her error of omission was adequately cured by the presence of the verbatim judgment in appellee's brief. The Supreme Court's Order of July 29, 1977 remanded the case

to this Court for review on the merits.[1] We now proceed pursuant to that Order.

Dorothy Abney's appeal presents the following issues for review:

(1) whether two prior Tennessee decrees precluded the Indiana trial court from entertaining the husband's petition for dissolution;

(2) whether the trial court erred in not exercising its equitable discretion to deny dissolution, even though the marriage was irretrievably broken; and

(3) whether appellant was denied procedural due process.

We affirm.

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[1] The Order of Remand reads as follows:

"It is the opinion of this Court that *appellant's* error of omitting the verbatim statement of the judgment (decree) from his brief was adequately cured by the presence of the verbatim judgment in *appellee's* brief. *See Teeple v. State ex rel. Bower* (1908) 171 Ind. 268, 86 N.E. 49. Moreover, our opinion is bolstered by the rule of law that appeals should be decided on the merits wherever possible. *See State v. Heslar* (1972) 257 Ind. 625, 277 N.E.2d 796. This Court believes the Court of Appeals will not be inconvenienced in this case if it has to find the verbatim judgment in the appellee's rather than the appellant's brief.

"Therefore, pursuant to this opinion it is ordered that this case be and the same is remanded to the Court of Appeals, for review on the merits." (Original emphasis)

This Order would appear to reject the rationale in *Suess v. Vogelgesang* (2d Dist. 1972) 151 Ind.App. 631, 281 N.E.2d 536, insofar as Ind. Rules of Procedure, Appellate Rule 8.3(A)(4) is concerned.

I

INDIANA TRIAL COURT DID NOT VIOLATE FULL FAITH AND CREDIT OR COMITY PRINCIPLES IN ENTERTAINING HUSBAND'S PETITION FOR DISSOLUTION

The Indiana decree dissolving this marriage represents the culmination of a rather protracted history of litigation between these parties.

James and Dorothy Abney were married on November 27, 1958. After a little more than five years, Dorothy Abney vacated the marital home in Florida and moved to Tennessee with their two children. The parties have lived apart ever since.

Dorothy Abney obtained a separate maintenance decree from the Probate Court of Davidson County, Tennessee (hereinafter referred to as the Tennessee court). The decree, dated May 25, 1964, ordered James Abney to pay support to his wife and two minor children.[2]

In the period that followed, the Tennesee court entertained successive petitions from James Abney for divorce. His first petition was dismissed, a decision which on appeal was affirmed in part and reversed in part. *Abney v. Abney* (1968), 222 Tenn. 160, 433 S.W.2d 847.[3] On remand, his supplemental petition

[2] The decree ordering payment of $300 per month was modified on appeal to $260 per month. For the past history of this litigation, see generally, *Abney v. Abney* (1970) 61 Tenn. App. 531, 456 S.W. 2d 364.

[3] James Abney's original petition requested that either he or his wife be granted an absolute divorce under a statutory proviso empowering the court to grant an absolute divorce where a separate maintenance decree or a decree of divorce from bed and board had been in existence more than two years without reconciliation. Tenn. Code Annot. § 36-802 (1976 Supp.). The Tennessee Supreme Court held that an absolute divorce under this section must be awarded to the same party who previously had obtained the limited divorce, although either party could petition for the absolute divorce on such ground. The dismissal of that part of the petition requesting that James Abney be granted an absolute divorce was affirmed. The other part of the petition requesting that the wife's separate maintenance decree be changed to a decree for absolute divorce was remanded to the trial court for further consideration.

for divorce was also dismissed.[4] This Tennessee decree, dated July 21, 1969, incorporates by reference an earlier memorandum opinion which refers to a previous adjudication finding James Abney in contempt for his failure to pay $1,160 arrearage in support. The Tennessee court specifically dismissed the husband's divorce petition for the following reason, as stated in the decree:

> "[James Abney's] contempt of Court bars him from asking this Court to grant an absolute divorce to his wife."

The case on appeal, affirming the dismissal, is reported at (1970) 61 Tenn.App. 531, 456 S.W.2d 364.

The record next discloses that James Abney filed the present dissolution of marriage petition in the Circuit Court of Marion County, Indiana, on October 8, 1974. Dorothy Abney responded with a Motion to Dismiss and an Answer, in essence requesting the Indiana trial court to defer to the Tennessee court because of the previous litigation in that state.

After the Indiana court refused to defer, Dorothy Abney obtained another order from the Tennessee court finding James Abney in further contempt and this time restraining him from pursuing a dissolution of marriage in any other jurisdiction, particularly Indiana. The Tennessee decree, dated April 16, 1975, issued a restraining order for the reason that,

[4] The decree also increased the amount of the support payments to $375 per month.

"this court [has] continuing jurisdiction over this Defendant through a separate maintenance decree . . . [and] refused this Defendant such relief previously requested under T.C.A. 36-802 because of his being in contempt, and this contempt having never been purged."

Dorothy Abney argues that under the Full Faith and Credit Clause of the United States Constitution or, alternatively, as a matter of comity, the Tennessee decrees of July 21, 1969 and April 16, 1975 precluded the Indiana trial court from entertaining James Abney's petition for dissolution.

[1] With regard to the decree of July 21, 1969, we find nothing in the Tennessee court's order which, standing alone, could be given Full Faith and Credit or be recognized as a matter of comity by the Indiana trial court. The Tennessee court made no pronouncement relating to Indiana. It did not decree that the contempt was a bar to a foreign dissolution or divorce, but merely that it chose not to grant the husband's petition because of his unpurged contempt.

The other Tennessee decree, dated April 16, 1975, presents a more difficult problem because this time the court went further and not only issued an additional contempt citation but specifically enjoined James Abney from obtaining dissolution of the marriage in Indiana. Having found no Indiana authority on the operative effect of such a foreign anti-suit injunction, we turn to case precedent from other jurisdictions for guidance.

The reported cases unanimously agree that in the absence of a controlling United States Supreme Court decision to the contrary, there is no constitutional compulsion to recognize anti-suit injunctions.

[2] Various reasons have been advanced for denying Full Faith and Credit. It has been suggested that such injunctions do

not adjudicate the merits of the ultimate controversy; they merely enjoin prosecution of the action in another state.[5] *Union Pacific R. Co. v. Rule* (1923), 155 Minn. 302, 193 N.W. 161. Other cases have reasoned that since an anti-suit injunction acts upon the parties rather than the court, the forum has the power to proceed notwithstanding the sister-state injunction. *Dominick v. Dominick* (1960), 26 Misc.2d 344, 205 N.Y.S.2d 503, citing *Kleinschmidt v. Kleinschmidt* (1951), 343 Ill.App. 539, 99 N.E.2d 623. The underlying rationale appears to be that each state has a legitimate interest in determining for itself the fairness or unfairness of any resort to its courts. See generally, Ehrenzweig, *Treatise on the Conflict of Laws* (1962), p. 183; Reese, "Full Faith and Credit to Foreign Equity Decrees," 42 Iowa L.Rev. 183 (1957). In the present context, moreover, the suggestion that a court *must* decline to hear a divorce action when confronted with a sister-state injunction is contrary to the United States Supreme Court's approval of migratory divorces and the requirement that Full Faith and Credit be given to such decrees. If a state has the power, i. e. the jurisdiction, to grant a divorce as against a non-resident party, certainly that power is not destroyed because an anti-suit injunction has been issued by a sister-state. *See, e.g., Keck v. Keck* (1972), 8 Ill.App. 3d 277, 290 N.E.2d 385, rev'd on another ground (1974) 56 Ill.2d 508, 309 N.E.2d 217.

Thus in those instances where deference has been extended it has been based on comity rather than on the constitutional command of Full Faith and Credit. *E. g., Strubinger v. Mid-Union Indemnity Co.* (1961), Mo. App., 352 S.W.2d 397; *Allen v. Chicago, Great Western R. Co.* (1925), 239 Ill.App. 38; *Fisher v. Pacific Mut. Life Ins. Co.* (1916), 112 Miss. 30,

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[5] *But see,* Laflar, *American Conflicts Law* (1968), pp. 118-19:
"As an original question it would be arguable that the full faith and credit clause should compel the other state to accept the injunction as an adjudication of the impropriety of the forum for suit, but the authorities are all the other way."

72 So. 846; *Gilman v. Ketcham* (1893), 84 Wis. 60, 54 N.W. 395. *Contra, Frye v. Chicago, R. I. & P. Ry. Co.* (1923), 157 Minn. 52, 195 N.W. 629, cert. denied 263 U.S. 723, 44 S. Ct. 231, 68 L.Ed. 525; *State ex rel. Bossung v. District Court* (1918), 140 Minn. 494, 168 N.W. 589. See generally, Annot., 74 A.L.R.2d 828.

[3] However, the rules of comity do not require compulsory recognition of foreign anti-suit injunctions. *See, e. g., Cunningham v. Cunningham* (1964), 25 Conn.Sup. 221, 200 A.2d 734; *James v. Grand Trunk W. R. Co.* (1958), 14 Ill.2d 356, 152 N.E.2d 858, cert. denied 358 U.S. 915, 79 S.Ct. 288, 3 L.Ed.2d 239; *Alford v. Wabash Ry. Co.* (1934), 229 Mo.App. 102, 73 S.W.2d 277; *Nichols & Shepard Co. v. Wheeler* (1912), 150 Ky. 169, 150 S.W. 33. See generally, Annot., 74 A.L.R.2d 828.

[4] The cases surveyed which have faced the issue, albeit not necessarily in connection with a pending dissolution of marriage action, are generally in agreement. Where a sister-state enjoins a litigant from proceeding with a *previously instituted* action, the court in the forum state will usually refuse to recognize the injunction as a bar to disposition of the pending action. Recognition is thus made to depend on priority of jurisdiction, the controlling factor being not the issuance of the anti-suit injunction but whether the state issuing the injunction was the first to obtain jurisdiction of the cause. *See,* 42 Am. Jur2d, Injunctions, § 227, p. 1009. This approach is based on the policy that after suits are commenced in one state, it is inconsistent with inter-state harmony to let the courts of another state control their prosecution. The court which first obtains jurisdiction of the case should ordinarily be permitted to retain it until the cause is finally adjudicated, without interference from the courts of other states. *See, James v. Grand Trunk W. R. Co., supra,* and the cases cited therein.

This is not to say that priority of jurisdiction will be the dispositive factor in every case. The equities involved and the other competing interests of the two jurisdictions should also be considered. *See, e. g., Roggenkamp v. Roggenkamp* (1975), 25 Md.App. 243, 333 A.2d 374.

[5] We find that our own cases which have had occasion to consider comity principles in related situations are in accord with this approach. Indiana recognizes comity not as a matter of right, but, out of deference and goodwill, as a rule of practice which promotes uniformity of decision and inter-state harmony. *State of Florida ex rel. O'Malley v. Dept. of Insurance of the State of Indiana* (2d Dist. 1973), 155 Ind. App. 168, 176, 291 N.E.2d 907, 912. The courts of this State are bound to help enforce the laws of sister-states unless enforcement would result in a violation of Indiana law or injury to local citizens.[6] *Sweigart v. State* (1938), 213 Ind. 157, 168, 12 N.E.2d 134.

[6] In this case, Dorothy Abney argues that the Tennessee court retained "continuing jurisdiction over the marital relationship", thereby implying that suit was already pending in Tennessee. We conclude, to the contrary, that no action was pending in Tennessee which barred suit in Indiana *for dissolution of the marriage.* Indiana was the first to obtain jurisdiction of this matter.

The Tennessee court did not indicate that it retained jurisdiction with respect to any divorce or dissolution action between these parties. The husband's petition for divorce was not held in abeyance but was specifically dismissed because of his unpurged contempt.

[7, 8] Even if the Tennessee court had continuing jurisdiction with respect to the separate maintenance decree for purposes

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[6] The same principle applies whenever the propriety of issuing an injunction against foreign suit is considered. The power to interfere with a litigant duly pursuing legal rights and remedies in another state should be exercised sparingly. *See, New York, Chicago & St. Louis R. Co. v. Perdiue* (1933) 97 Ind.App. 517, 187 N.E. 349.

of modification, separate maintenance and divorce are generally considered separate causes of action. A suit for separate maintenance is for the purpose of enforcing the obligations of the marriage, whereas a suit for divorce is an action for dissolution of the marriage.[7] *See, Estin v. Estin* (1948), 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561 (incidents of the marital status are separable from the marital status itself). See generally, 24 Am.Jur2d, Divorce & Separation, § 3, p. 178. Hence a separate maintenance decree is ordinarily no bar to a later action for divorce.[8] *Owen v. Owen* (1973), 389 Mich. 117, 205 N.W.2d 181, cert. denied 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64; *Fullwood v. Fullwood* (1967), 270 N.C. 421, 154 S.E.2d 473; *Allums v. Allums* (1971), Tex.Civ.App., 465 S.W.2d 461.

Regarding the other state interests involved in this litigation, we note that there is no indication of record that James Abney's residence in Indiana was a pretense for the purpose of procuring a dissolution. If this were the case, Indiana might have an interest in preventing resort to its courts for such a fraudulent purpose. But Indiana's interest in protecting the rights of its citizens runs counter to recognition of the Tennessee injunction. James Abney is a bona fide resident of the State, with the same right that each Indiana citizen has to adjudicate his marital status in our State courts.

On the other hand, any legitimate interest which Tennessee had in the ongoing litigation between these parties was protected by the Indiana trial court's dissolution decree.

In the Tennessee decree of April 16, 1975, reference is made to James Abney's unpurged contempt as grounds for enjoining

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[7] Compare Tenn.Code Annot. § 36-820 (separate maintenance) with §§ 36-801 & 802 (divorce) (1977 Replacement).

[8] The res judicata effect of the decree, as to particular fact issues, is quite a different matter. *See* Annot., 90 A.L.R.2d 745, supplementing 138 A.L.R. 346.

the dissolution of marriage proceeding in Indiana. We would agree that Tennessee's interest in preserving the integrity of its judicial system is of paramount importance. However, in our opinion the trial court did give effect to this contempt aspect of the Tennessee decree. The judgment herein incorporates the support arrearage which formed the basis of the contempt citation. The Indiana trial court specifically ordered James Abney to pay $10,390 in past due support and maintenance "as ordered by the Tennessee courts."

To the extent Dorothy Abney is arguing that the Indiana court should have refused to entertain the cause altogether and deferred to the Tennessee court for resolution of this marital relationship, we decline to so hold. A contempt citation and the penalties therefor are directed against the person held in contempt. A party's unpurged contempt does not *ipso facto* divest a court of the authority to entertain a cause altogether.

This is not to say that an adjudication of contempt by a sister-state has no effect on similar litigation between the same parties in Indiana. A litigant who has been found in contempt by a court of this State is not permitted to flout the judicial process and may be barred from proceeding further with his cause until the contempt is purged. *See, Smith v. Smith* (1892), 2 Blackf. 232. *But cf., State ex rel. Gruenoch v. Miller* (1937), 212 Ind. 147, 8 N.E.2d 245. In such cases, the court's jurisdiction is not affected, it retains the power to entertain the cause. The plaintiff is merely barred on equitable grounds from proceeding further with his litigation.

In a proper case it may be appropriate to extend this equitable principle to a foreign contempt adjudication. However, this is not the question before us. We merely note that an important distinction exists between challenging the court's exercise of jurisdiction on grounds of comity and challenging the plaintiff's right to proceed on equitable ground. Dorothy Abney's argu-

ment is confined to the former. We therefore hold, for the reasons discussed, that the exercise of jurisdiction by the Indiana trial court was not improper under the circumstances.

II

TRIAL COURT WAS CORRECT IN AUTOMATICALLY GRANTING DISSOLUTION UPON FINDING "IRRETRIEVABLE BREAKDOWN" OF THE MARRIAGE

Dorothy Abney argues that the trial court should have exercised equitable discretion to deny the dissolution, notwithstanding its finding that the marriage was irretrievably broken. She does not challenge the finding of irretrievable breakdown.

Our Dissolution of Marriage Act plainly does not lend itself to such an interpretation. I.C. 31-1-11.5-1 et seq. (Burns Code Ed., Supp.1977).

[9] When a petition for dissolution alleges "irretrievable breakdown", the key issue for the trial court's determination is whether there is a reasonable possibility of reconciliation. The relevant portion of I.C. 31-1-11.5-8(a) reads:

> "Upon the final hearing: the court shall hear evidence and, if it finds that the material allegations of the petition are true, either enter a dissolution decree as provided in section 9(a) . . . or if the court finds that there is a reasonable possibility of reconciliation, the court may continue the matter and may order the parties to seek reconciliation through any available counseling."

This provision, while perhaps inartfully drawn, has been interpreted in accordance with other sections of the Act. If a "reasonable possibility of reconciliation" exists, the court may continue the matter and order the parties to seek reconciliation through counseling. But if there is no reasonable possibility of reconciliation, the marriage is necessarily irretrievably broken, in which case the Act directs the trial court to grant dissolution.

See Flora v. Flora (1st Dist. 1975), Ind.App., 337 N.E.2d 846, 849-850. I.C. 31-1-11.5-9(a) provides that "when the court has made the findings required by section 8(a) . . ., the court *shall* enter a dissolution decree [emphasis supplied]." Similar mandatory language[9] is found in I.C. 31-1-11.5-3(a):

> "[a] dissolution of marriage . . . *shall* be decreed upon a finding by a court of one of the following grounds, and no other: (1) irretrievable breakdown of the marriage . . . [emphasis supplied]."

The Act thus gives the trial court no alternative but to grant a dissolution once it finds an irretrievable breakdown of the marriage.

We are not insensitive to Dorothy Abney's ultimate concern in this case. She suffers from severe rheumatoid arthritis which requires costly medical treatment. According to the parties' stipulations, the assistance she has been receiving through James Abney's military benefits terminates upon dissolution of the marriage. Dorothy Abney claims these benefits are her "life blood" and respectfully asserts that the equities compel us to reverse the dissolution decree.

[10] The statute does not provide for the exercise of such discretion on the part of this Court any more than it permits such at the trial court level. We find that Dorothy Abney did pursue her proper recourse under the Act, and was awarded maintenance as an incapacitated spouse. Admittedly, the trial court found that James Abney at present is economically unable to provide her with sufficient maintenance to offset the loss of the medical benefits.[10] Yet we are without authority to reverse

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[9] The word "shall" in a statute is generally construed in an imperative and mandatory sense. *Sherrard v. Board of Com'rs of the County of Fulton* (1st Dist. 1972) 151 Ind.App. 127, 278 N.E.2d 307.

[10] Maintenance of an incapacitated spouse is subject to future modification. I.C. 31-1-11.5-9(c) (Burns Code Ed.1977); *Newman v. Newman* (2d Dist. 1976) Ind.App., 355 N.E.2d 867.

a dissolution decree correctly entered solely because the effect of the dissolution will be to terminate benefits which are advantageous to one of the parties.

III

DUE PROCESS WAS NOT DENIED

[11] Dorothy Abney argues that if a finding of irretrievable breakdown results automatically in a dissolution decree, then in effect no consideration is given to the "incidents" of the marriage and the Act is an unconstitutional denial of procedural due process. She claims that the incidents of a marriage constitute property which cannot be taken without notice and an opportunity to be heard. Although her brief fails to point to any "incident" of this marriage that was not considered by the trial court, we presume she is referring to the medical assistance she received through James Abney's military benefits.

However, the trial court specifically found that "such insurance coverages which are presently in effect because of the marital relationship are not porperty rights." Appellant does not challenge this finding on appeal apart from her bald assertion that the "Act disturbs [her] property rights without requiring consideration of such rights."

We cannot find a denial of procedural due process, absent a showing of interference with a cognizable property right. No such showing was made here.

Accordingly, the dissolution decree and judgment are affirmed in all respects.

LYBROOK, J. (participating by designation) and

WHITE, J., concur.

APPENDIX B

STATE OF INDIANA
(Seal)
Telephone 633-5200 Indianapolis, 46204
Clerk of the Supreme Court and Court of Appeals
Billie R. McCullough, Clerk
217 State House

No. 2-1275A382

Dorothy Annette Abney v. James Harold Abney

You are hereby notified that the Supreme Court has on this day Appellant's Petition to Transfer is hereby DENIED. Given, C.J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 10th day of July, 1978.

(Seal)

/s/ Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

APPENDIX C

In the Probate Court of Davidson County, Tennessee

Dorothy Annette Abney

v.

James Harold Abney.

No. 43350
MINUTE BOOK 3, PAGE 309

DECREE

This cause came on to be heard before the Honorable Shelton Luton, Judge on this 25th day of May, 1964, upon the original bill for separate maintenance of the complaint, the answer of the defendant, the testimony of witnesses appearing in open court, and exhibits to the court shown, from all of which the court finds that the complainant is entitled to separate maintenance and support by the defendant and that the defendant should maintain and support the complainant and the two minor children of this marriage separately and apart from himself which is hereby granted.

IT IS, THEREFORE, ordered, adjudged and decreed by the court that the defendant maintain and support the complainant and their two minor children separately until further ordered by the court.

It is further ordered by the court that the complainant have the care, custody and control of the two minor children until further ordered by the court.

It is further ordered by the court that the defendant pay $300.00 per month to the Clerk of the Circuit Court, Alf Rutherford, for the separate maintenance and support of the complain-

ant and the two minor children of this marriage, said payments to be made on or before the 10th day of each month hereafter, commencing with the month of June, 1964, and continuing until further ordered by the court.

It is further ordered and decreed that the costs of this cause be taxed to the defendant, for which execution may issue.

/s/ SHELTON LUTON
Judge

APPROVED FOR ENTRY:

/s/ W. P. ORTALE

Solicitor for Complainant

I hereby certify that I have mailed a copy of this order to the defendant at the U.S. Naval Annex, Com. Des. Div. 601, Key West, Fla. this 29th day of May 1964.

APPENDIX D

James Harold ABNEY, Petitioner,

v.

Dorothy Annette ABNEY, Respondent.

Supreme Court of Tennessee.

Oct. 28, 1968.
(433 S.W.2d 847)

Wife obtained decree awarding her separate maintenance and husband filed petition for absolute divorce more than two years later. The Probate Court, Davidson County, Shelton Luton, Jr., dismissed the action and husband appealed. The Supreme Court, Dyer, J., held that court had no authority to award husband absolute divorce under his petition requesting granting of absolute divorce to either husband or wife, but decree awarding wife separate maintenance could be changed to award wife absolute divorce.

Reversed in part and remanded.

1. Divorce Key 13

Amendment empowering court to grant absolute divorces where there has been final decree of divorce from bed and board or of separate maintenance for more than two years is incorporated into section setting forth grounds for divorce and must be construed as if it had always been a part thereof. T.C.A. § 36-802.

2. Divorce Key 13

It is the duty of the court to ascertain and give effect to legislative intent expressed in amendment empowering court to grant

absolute divorce where there has been a final decree of divorce from bed and board or of separate maintenance for more than two years, as part of section setting forth grounds for divorce. T.C.A. § 36-802.

3. Statutes Key 223.2(23)

Statutory section setting forth grounds for divorce and empowering court to grant divorce after final decree of divorce from bed and board or of separate maintenance for more than two years must be construed in pari materia with other sections relating to divorce. T.C.A. § 36.802.

4. Constitutional Law Key 70(3)

It is the duty of the courts to give effect to statutes specifying grounds for divorce, regardless of whether courts agree or disagree with wisdom of legislature's choice. T.C.A. § 36-802; Const. art. 11, § 4.

5. Divorce Key 13

The purpose of amendment empowering court to grant absolute divorce where there has been final decree of divorce from bed and board or of separate maintenance for more than two years was to grant relief to persons living in enforced celibacy. T.C.A. § 36-802.

6. Divorce Key 157

Amendment empowering court to grant absolute divorce where there has been final decree of divorce from bed and board or of separate maintenance for more than two years provides additional cause or ground for divorce. T.C.A. § 36-802.

7. Divorce Key 155, 163, 164

Decree of divorce from bed and board or separate maintenance is not regarded as final decree and it may be changed, amended or modified as justice and equity may require upon petition of party to whom it was awarded and upon proper showing. T.C.A. § 36-802.

8. Divorce Key 59

Petition for absolute divorce filed under statute empowering court to grant divorce where there has been final decree of divorce from bed and board or of separate maintenance for more than two years is required to be filed in the court which granted the limited decree. T.C.A. § 36-802.

9. Divorce Key 200

Upon granting absolute divorce under statute empowering court to grant absolute divorce where there has been a final decree of divorce from bed and board or of separate maintenance for more than two years, the court is then empowered to adjust support and property rights of the parties. T.C.A. § 36-802.

10. Divorce Key 157

Under statute empowering court to grant absolute divorce where there has been final decree of divorce from bed and board or of separate maintenance for more than two years, absolute divorce must be awarded to same party who previously obtained limited divorce. T.C.A. § 36-802.

11. Divorce Key 150(2)

In divorce action, desires of parties, particularly party without fault, are given consideration but such does not control action of court. T.C.A. § 36-802.

12. Divorce Key 157

Where husband petitioned for absolute divorce to be granted either to him or to his wife, on ground that parties had lived for more than two years under decree for separate maintenance obtained by his wife, court could not award husband a divorce, but separate maintenance decree could be changed to award wife an absolute divorce. T.C.A. § 36-802.

James W. Rutherford, Nashville, of counsel, Stockell, Rutherford & Crockett, Nashville, for petitioner.

William P. Ortale, Nashville, of Counsel, Smith, Ortale & Smith, Nashville, for respondent.

OPINION

DYER, Justice.

This cause comes to this Court from the action of the trial court in sustaining a demurrer dismissing the action. In this opinion for convenience and clarity, we will refer to petitioner James Harold Abney as "husband", and respondent Dorothy Annette Abney as "wife."

On May 25, 1964, the wife, upon her bill filed against her husband in the Probate Court for Davidson County, obtained a decree awarding her separate maintenance. On October 23, 1967, the husband filed the petition here at issue in the Probate Court for Davidson County alleging the parties had lived under the decree for separate maintenance for more than two years and that they have not and cannot become reconciled. The relief prayed for under T.C.A. 36-802, as amended by Chapter 283, Public Acts of 1963, was that either the husband or the wife be granted an absolute divorce.

To this petition the wife filed a demurrer on the following grounds: (1) She does not in any way join in this petition for

divorce; (2) the husband has stated no grounds for being granted an absolute divorce and under T.C.A. 36-802, is given no right to an absolute divorce without first showing grounds by clear and convincing evidence.

Chapter 283, Public Acts of 1963, is an amendment to T.C.A. 36-802, which Code section prior to the amendment read as follows:

> The following shall be causes of divorce from bed and board; or from the bonds of matrimony, in the discretion of the court:
>
> (1) That the husband or wife is guilty of such cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper, and, in the case of the wife, to be under the dominion and control of the husband.
>
> (2) That the husband has offered such indignities to the wife's person as to render her condition intolerable, and thereby forced her to withdraw.
>
> (3) That he has abandoned her, or turned her out of doors, and refused or neglected to provide for her.

Chapter 283 amended this Code section by placing at the end thereof the following language:

> Provided, however, that the circuit, chancery or such other court specially empowered to grant divorces shall also have the power to grant absolute divorces to either party where there has been a final decree for divorce from bed and board, or of separate maintenance for more than two (2) years, upon a petition being filed by either party that sets forth the original decree for divorce from bed and board, or separate maintenance, and that the parties have not become reconciled. The court granting the absolute divorce shall make a final and complete adjudication of

> the support and property rights of the parties. However, nothing in this paragraph shall preclude the divorce forum from granting an absolute divorce before the two (2) years has expired.

[1-4] This amendment to T.C.A. 36-802 incorporates itself into this Code section and the Code section is then construed as if the amendment had always been a part thereof. It is then our purpose and duty to ascertain and give effect to the legislative intent expressed in this 1963 amendment, not standing alone, but as a part of this Code section. Further, this Code section as amended is construed in pari materia with other Code sections relating to divorce. See cases cited in 17 Tenn. Digest, Statutes, Sections 181, 223.2(1), 225, 230. We also need to keep in mind that Article 11, Section 4, of the Constitution of Tennessee expressly confers upon the legislature the power to specify by law the causes or grounds for divorce. Whether the courts agree or disagree with the wisdom of their choice is immaterial as it is our duty to give effect to them so long as they remain on the statute books. Lanier v. Lanier, 52 Tenn. 462 (1871).

[5] We think the paramount intent of the legislature in enacting this 1963 amendment to this Code section can be found in statements made by Chief Justice Green in Lingner v. Lingner, 165 Tenn. 525, 56 S.W.2d 749 (1933). Chief Justice Green, after noting that a person living under a decree of limited divorce is in effect living in a world of enforced celibacy, neither married nor unmarried, said:

> Society is not interested in perpetuating a status out of which no good can come and from which harm may result. 165 Tenn. at 534, 56 S.W.2d at 752.

The intent of this amendment is to empower the courts to grant relief to persons finding themselves in such a situation.

[6] There are no ambiguities in this 1963 amendment. It simply empowers courts having divorce jurisdiction, upon a showing the criteria set out therein has been fulfilled authority to grant an absolute divorce. This is, in effect, another cause or ground for divorce.

[7, 8] A decree of divorce from bed and board or separate maintenance is not regarded as a final decree in the sense said decree upon petition of the party to whom it was awarded and proper showing may be changed, amended or modified as justice and equity may require. Cureton v. Cureton, 117 Tenn. 103, 96 S.W. 608 (1906); Riggs v. Riggs, 181 Tenn. 633, 184 S.W.2d 9 (1944). Under these decisions in regard to decrees for limited divorce and the language of this 1963 amendment a petition for an absolute divorce filed relying upon said amendment is required to be filed in the court granting the limited decree.

[9, 10] Upon the court granting an absolute divorce under this 1963 amendment, the court is then empowered by the same amendment to adjust the support and property rights of the parties. Since under other Code sections in regard to adjustment of property rights and support in divorce actions, such rights are affected by the fact of which party obtains the divorce, then construing this 1963 amendment in pari materia with these Code sections requires an absolute divorce under this 1963 amendment be awarded to the same party previously obtaining the limited divorce.

[11] Under the first ground of the demurrer the wife, in effect, says she does not seek an absolute divorce. In a divorce action the desires of the parties, particularly the party without fault, are given consideration but such does not control the action of the court. Lingner v. Lingner, supra. The first ground of the demurrer is without merit.

[12] The husband sought relief either by the court granting to him or to his wife an absolute divorce. This petition was filed as a result of two years expiring since the decree awarding the wife separate maintenance. Under this petition the court has no authority to award the husband a divorce. The decree awarding the wife separate maintenance can be changed to award the wife an absolute divorce. The demurrer insofar as it applies to the husband seeking a divorce is sustained. Otherwise, the judgment of the court is reversed and the cause remanded for further proceedings.

BURNETT, C. J., and CHATTIN, CRESON and HUMPHREYS, JJ., concur.

APPENDIX E

In the Probate Court of Davidson County, Tennessee

Dorothy Annette Abney
vs.
James Harold Abney

No. 43350
Minute Book 14-B,
Page 549

Decree

(Entered July 21st, 1969)

This cause came on to be heard March 25, 1969, before the Honorable Shelton Luton, Judge upon the petition of the defendant, James Harold Abney, seeking to have an absolute divorce granted to complainant, Dorothy Annette Abney, the procedendo and order of remand of the Supreme Court, the preliminary motion of the complainant, complainant's answer to the petition, testimony of the complainant adduced orally before the Court and exhibits thereto, testimony by deposition of Lieutenant Colonel John A. Barrett, M.D., on behalf of the complainant and testimony by deposition of the defendant, briefs and arguments of counsel and the entire record in the cause, all of which the Court took under advisement and from which the Court finds after considerable deliberation as set out in its memorandum opinion dated June 23, 1969, (which memorandum is hereby incorporated in toto, by reference) and as a result of these findings the Court is of the opinion that the defendant is in open and notorious contempt of the orders of this Court, that the defendant's contempt predates the petition of the defendant and that the defendant has never made any attempt to purge this contempt and that the defendant's contempt of Court bars him from asking this Court to grant an absolute divorce to his wife, and therefore defend-

ant's petition should be dismissed, and the Court further finds that complainant is entitled to an increase in alimony and child support payments and that the defendant should pay complainant's solicitor of record a reasonable fee for services.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendant's petition be and the same is hereby dismissed at defendant's cost.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the [alimony and (SL)]* support payments to complainant and two minor children of this marriage be increased and that the defendant pay $375.00 per month on or before the 10th day of each month to the complainant beginning July 10, 1969, for support of complainant and minor children of this marriage, until further orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant pay the complainant's solicitor, W. P. Ortale a reasonable fee of $500.00 for his services in connection with the representation of the complainant in this case since the decree for separate maintenance was entered.

For all of which execution may issue if necessary.

The defendant is hereby granted leave to appeal and is granted [30 (thirty)] days within which to perfect his appeal [and 60 (sixty) days within which to file his bill of exceptions, said time to run from July 21, 1969, the date of the filing of this decree. (SL)]

/s/ SHELTON LUTON
Judge

Approved for Entry:

/s/ W. P. ORTALE
Attorney for Complainant

/s/ J. WM. RUTHERFORD
Attorney for Defendant

---

* Material appearing in brackets was handwritten in original.

APPENDIX F

Dorothy Annette ABNEY, Complainant-Appellee,

v.

James Harold ABNEY, Defendant-Appellant.

Court of Appeals of Tennessee,
Middle Section.

March 26, 1970.

Certiorari Denied by Supreme Court

June 15, 1970.
(456 S.W. 2d 364)

Husband, separated from wife, filed supplemental petition for absolute divorce and wife petitioned for increase in amount of support payments. The Probate Court, Davidson County, Shelton Luton, J., denied petition for absolute divorce and granted increase in amount of support payments, and husband appealed. The Court of Appeals, Todd, J., held that where husband was in contempt for failure to pay support, husband's petition asking for decree of absolute divorce was not separate matter unaffected by contempt and trial judge was justified in refusing to hear husband's petition because of his previously adjudged, unexplained and unpurged contempt of Court.

Affirmed.

1. Divorce Key 262, 311

Where husband, separated from wife, was in contempt for failure to pay support, husband's petition asking for decree of absolute divorce was not separate matter unaffected by con-

tempt, and trial judge was justified in refusing to hear husband's petition because of his previously adjudged, unexplained and unpurged contempt of court. T.C.A. § 36-802.

2. Contempt Key 20

The unexplained failure of a party to obey orders of court becomes more serious, rather than less serious, with continued noncompliance, and disobedient party cannot be purged of contempt by lapse of time.

3. Divorce Key 183

Even if trial judge was not justified in refusing to hear petition of husband for absolute divorce because of his previously adjudged, unexplained and unpurged contempt of court for failure to pay support, it would be impossible for Court of Appeals to consider application for divorce upon its merits, where only recent pleadings, evidence at last hearing and decree thereon were included in record on appeal. T.C.A. § 36-802.

4. Divorce Key 157

It is not mandatory that court grant an absolute divorce on sole ground of two-years legal separation without reconciliation, without pleading and proof of other grounds. T.C.A. § 36-802.

5. Divorce Key 157

Under statutory amendment creating additional circumstances under which courts in their discretion are empowered to grant absolute divorce, such divorces must be granted to same person who obtained original relief, requiring, in ruling uopn supplemental petition for absolute divorce following decree of separate maintenance, a retrospective consideration of previous pleading, evidence, and decree granting the original relief. T.C.A. § 36-802.

6. Divorce Key 154

In divorce action, desires of party without fault are considered but are not controlling.

7. Divorce Key 157

Where husband who had been separated from wife for more than two years and who filed supplemental petition for absolute divorce was unwilling to cohabit with his wife, rather than the reverse, celibacy of husband was voluntary, rather than enforced, and did not constitute reason for granting of absolute divorce. T.C.A. § 36-802.

8. Divorce Key 157

The freedom to legally cohabit with a partner of choice, as desirable as it may be, is not the sole consideration in the preservation or dissolution of the bonds of matrimony.

9. Divorce Key 157

Statute alleviating situations where so-called guilty party was willing to be reconciled and so-called innocent party declined to become reconciled was not intended to provide a means whereby a wrongdoer might force an unwanted divorce upon innocent spouse by persistence in wrongdoing by refusing to reconcile for additional two years and petitioning for divorce upon ground of separation for more than two years. T.C.A. § 36-802.

10. Divorce Key 157

Policy of society and state is to encourage preservation of marriage by reconciliation rather than to reward a refusal to be reconciled.

11. Divorce Key 235, 296

The amount of support allowed to wife and children is within sound discretion of trial judge, whose judgment will not be disturbed in absence of an abuse or misuse of such discretion or palpable injustice.

12. Divorce Key 245(3), 309

Evidence did not preponderate against judgment increasing support by husband, who had received pay increase, to $375.00 per month from $260.00 per month to children and wife, who had become afflicted with severe form of crippling arthritis and whose expenses had increased to $473.01 per month. T.C.A. § 27-303.

13. Divorce Key 6

In divorce litigation, the courts do not have unlimited power to relieve hardship upon estranged spouses and license pleasure, at expense of undue hardship to innocent parties.

William P. Ortale, Nashville, for complainant-appellee.

J. W. Rutherford, and J. William Rutherford, Nashville, for defendant-appellant.

OPINION

TODD, Judge.

Defendant, James Harold Abney, has appealed from a decree denying his supplemental petition for absolute divorce under § 36-802, T.C.A., 1963 amendment, and granting complainant's petition for increase in amount of support payments.

On May 25, 1964 the trial court entered a decree of separate maintenance, ordering payment of $300.00 per month. Upon appeal, said decree was modified by this Court by reducing said payments to $260.00 per month. On October 23, 1967, defendant filed a petition requesting that the complainant be awarded an absolute divorce because the parties had been legally separated more than two years without reconciliation. The complainant wife moved to dismiss the petition because of the husband's previously adjudged contempt of court. A detailed answer was also filed by the wife wherein she requested that maintenance payments be increased.

The decree, from which this appeal was taken, recites:

> "This cause came on to be heard March 25, 1969, before the Honorable Shelton Luton, Judge upon the petition of the defendant, James Harold Abney, seeking to have an absolute divorce granted to complainant, Dorothy Annette Abney, the procedendo and order of remand of the Supreme Court, the preliminary motion of the complainant, complaint's answer to the petition, testimony of the complainant adduced orally before the Court and exhibits thereto, testimony by deposition of Lieutenant Colonel John A. Barrett, M.D., on behalf of the complainant and testimony by deposition of the defendant, briefs and arguments of counsel and the entire record in the cause, all of which the Court took under advisement and from which the Court finds after considerable deliberation as set out in its memorandum opinion dated June 23, 1969, (which memorandum is hereby incorporated in toto, by reference) and as a result of these findings the Court is of the opinion that the defendant is in open and notorious contempt of the orders of this Court, that the defendants contempt predates the petition of the defendant and that the defendant has never made any attempt to purge this contempt and that the defendants contempt of Court bars him from asking this Court to grant an absolute divorce to his wife, and therefore defendants petition should be dismissed, * * *"

The decree then orders that defendant's petition be dismissed and that the support payments be increased to $375.00 per month.

There are three assignments of error, of which the third is as follows:

> "The Honorable Probate Court of Davidson County, Tennessee erred in ruling that no relief could be granted under this petition because of a ruling of contempt of Court against James Harold Abney in the year 1965."

The memorandum opinion of the trial judge refers to a judgment of contempt dated June 9, 1965, based upon non-payment of $1,160.00 support ordered by the court. Said judgment of contempt is not preserved in the record presented with this appeal. There is evidence in the record that no part of said arrearage has been paid. There is no evidence in this record of any effort on the part of defendant to purge himself of said contempt.

In Bradshaw v. Bradshaw, 23 Tenn.App. 359, 133 S.W.2d 617 (1939), the wife filed a petition for contempt for failure to pay alimony. Thereafter, the husband filed a petition for reduction of alimony. Upon hearing the first petition, the court adjudged the husband to be guilty of contempt and sustained a motion to strike the husband's petition for reduction. Upon appeal, this Court affirmed the judgment of contempt. Citing authorities, this Court also held that a court may properly refuse to hear any application of a party who is guilty of wilful contempt of court.

[1] Defendant urges that the present case is distinguishable from *Bradshaw*, because in that case both contempt and stricken

petition related to the same matter; i.e., alimony. It is insisted that in the present case the contempt involves support, and the dismissed petition involves a decree of absolute divorce, which are separate matters neither of which should affect the other. This proposition is not supported by citation of authority, nor is it supported by considerations of judicial or public policy.

This case is distinguishable from *Bradshaw* only by the gravity and duration of the contempt. In *Bradshaw* the defendant was adjudged guilty of contempt while his petition for reduction was pending and while he earnestly protested his inability to pay. In the present case, the defendant had been adjudged guilty of contempt over two years before his petition for absolute divorce was filed. There is no evidence in the record suggesting the slightest excuse for defendant's failure to pay the $1,160.00 delinquency or otherwise purge his contempt during the period from June 9, 1965 when he was adjudged guilty of contempt until October 23, 1967, when his petition was filed, or even before July 21, 1969 when his petition was dismissed.

[2] It can hardly be urged that there is a "statute of limitations" whereby a disobedient party may be purged of contempt by the lapse of time. The unexplained failure of a party to obey the orders of the court becomes more serious, rather than less serious with continued non-compliance.

In Gant v. Gant, 29 Tenn. 464 (1850), cited in *Bradshaw*, supra, the contempt related to violation of a preliminary injunction relating to disposal of property. The suit was dismissed on motion of the defendant. The Supreme Court reversed and said:

> "* * * During the second term, after the answer was received by the clerk, the motion to dismiss the bill for want of prosecution was allowed. In allowing this motion the chancellor erred. The defendant was in contempt, and being so, his answer could not be received, nor could he be heard to make a motion to dismiss till the contempt was cleared, and, for the purpose of being discharged from the contempt, an order of the chancellor in court was necessary, unless the contempt had been waived. 1 Dan.Ch.Pr. 559, 560; 1 Smith Ch.Pr. 62, note a, 2d Am. ed.
>
> "The clerk had no authority to discharge the contempt or to receive the answer. It was improperly placed on file and the complainant had the right to treat it as a nullity." 29 Tenn., pp. 465-466.

It is noteworthy that in his deposition the defendant offers no excuse or justification for his continued and contemptuous disobedience of the prior order of court.

Under the circumstances reflected by this record, the trial judge was justified in refusing to hear the petition of defendant because of his previously adjudged, unexplained and unpurged contempt of court.

The third assignment of error is respectfully overruled.

The foregoing renders unnecessary any consideration of the first assignment which complains of the denial of the petition for an absolute divorce. The first assignment is therefore pertermitted.

[3] It should be noted, however, that even if the third assignment were sustained, it would be impossible for this Court to consider the application for divorce upon its merits. The obvious intent of the 1963 amendment to § 36-802 T.C.A. is that the trial judge consider the entire case ab initio, including pleadings and evidence at former hearings, in deciding whether to grant the supplemental petition for absolute divorce. The record before this Court in this appeal does not enable

this Court to so consider the merits of the case. Only recent pleadings, the evidence at the last hearing and the decree thereon are included in this record.

[4] It is not mandatory that the court grant an absolute divorce upon the sole ground of two years legal separation without reconciliation, without pleading and proof of other grounds. Horlacher v. Horlacher, Tenn.App., 429 S.W.2d 438 (1967).

[5] The 1963 amendment to §36-802 T.C.A. did create additional circumstances under which the courts in their discretion were empowered to grant absolute divorces, but when granted under the provisions of this amendment, such divorces must be granted to the same person who obtained the original relief. Abney v. Abney, Tenn., 433 S.W.2d 847 (1968). This limitation necessarily implies a retrospective consideration of previous pleading, evidence, and decree granting the original relief.

[6] The desires of the party without fault are considered, but not controlling. Abney v. Abney, supra.

[7] Defendant protests bitterly that he is immured in the thralldom of enforced celibacy as deplored in Lingner v. Lingner, 165 Tenn. 525, 56 S.W.2d 749 (1932). This may be true, but according to the testimony of the parties, it is defendant who is unwilling to cohabit with his wife, rather than the reverse. In this respect, celibacy of defendant is voluntary, rather than enforced.

[8] Furthermore, the freedom to legally cohabit with a partner of choice, as desirable as it may be, is not the sole consideration in the preservation or dissolution of the bonds of matrimony. The present case is an outstanding exception to the pronouncements of Lingner v. Lingner.

The limited record before this Court at this time portrays the defendant as a member of the Armed Forces who, having

married and been divorced from a previous wife, married the complainant herein and produced two children. In 1964, the complainant obtained the initial relief of separate maintenance, presumably because of misconduct of defendant. Defendant completely ignored the orders of the court until the intervention of a Member of Congress and representations from his superiors brought about some compliance. Defendant has sought an absolute divorce in another state. Said application is still pending, and complainant has been burdened with the expense of retaining counsel to resist said application.

Complainant is now afflicted with a severe form of crippling arthritis for which she receives extensive medical attention and treatment without charge from facilities of the armed forces. This free service would terminate upon the termination of the marital relation between complainant and defendant.

Complainant testifies that she has been ever ready and still is ready for reconciliation with defendant. Defendant testifies that a reconciliation is impossible.

It is difficult to conceive how a trial judge could be reversed for declining to pronounce an absolute divorce under such circumstances.

[9, 10] The 1963 amendment to § 36-802, T.C.A. was largely aimed at those situations wherein the so-called "guilty party" was willing to be reconciled and the so-called "innocent party" declined to become reconciled. Although not limited to such situations, it is extremely doubtful that the legislature intended to provide a means whereby a wrongdoer might force an unwanted divorce upon the innocent spouse by persistence in wrong-doing and refusal to reconcile for an additional two years. The policy of society and the State is to encourage preservation of marriage by reconciliation rather than to reward a refusal to be reconciled.

The second assignment of error complains of the action of the trial judge in increasing the support for wife and children

to $375.00 per month. It is insisted that no basis is shown for such an increase.

The narrative bill of exceptions contains evidence that the expenses of maintaining complainant and her two children have increased to $473.01 per month because of the necessity of removal from her parents' home to a separate residence. There is also reference to pay increases received by defendant, which he has not denied. There is evidence to support the increase in support, and none is cited or found to the contrary.

[11] The amount of support allowed to wife and children is within the sound discretion of the trial judge, whose judgment will not be disturbed in the absence of an abuse or misuse of such discretion or palpable injustice. Crouch v. Crouch, 53 Tenn.App. 594, 385 S.W.2d 288 (1964), and authorities cited therein.

[12] This judgment, as all other non-jury judgments, comes to the Court for review de novo, accompanied by a presumption of its correctness unless the evidence preponderates otherwise. § 27-303, T.C.A. The evidence does not preponderate otherwise.

The second assignment of error is respectfully overruled.

[13] This Court is not oblivious to the hardships imposed by necessity upon estranged spouses. The peculiar situation of these parties makes their hardships more onerous than usual. The courts do not have unlimited power to relieve hardship and license pleasure, at the expense of undue hardship to innocent parties.

The decree of the trial judge dismissing the petition of defendant and increasing payments to $375.00 per month is affirmed. The defendant-appellant will be taxed with costs of this appeal.

Affirmed.

SHRIVER, P. J., and PURYEAR, J., concur.

APPENDIX G

In the Probate Court of Davidson County, Tennessee

Dorothy Annette Abney

vs.

James Harold Abney
8828 El Monte Drive
Indianapolis, Indiana 46226

No. 43350

Decree

(Entered April 15, 1975)

This cause came on to be heard before the Honorable James C. Dale, Jr., Special Judge, on the 16th day of April, 1975, upon the motion of Petitioner, Dorothy Annette Abney, for confirmation of service of Process on the defendant, James Harold Abney, through the Secretary of State of Tennessee, pursuant to T.C.A. 20-236, and the Petition for Contempt of the orders of this court, filed by Petitioner against this defendant on March 10, 1975; and upon consideration of the pleadings, affidavit of the Secretary of State, affidavit of W. P. Ortale and argument of counsel the Court finds that this defendant has been properly served with Process, that the defendant has, in fact, been properly served with this Petition for Contempt and did, in fact, fail to appear as ordered by this Court and show cause why he should not be held in contempt of this Court and appropriately punished for his failure, and further to show why he should not be enjoined from applying to jurisdictions other than this jurisdiction for a dissolution of this marriage, this court having continuing jurisdiction over this defendant through a separate maintenance Decree previously entered in this court; all of which

the Court finds this defendant failed to do, and is now in default. It is particularly noted that this defendant is seeking a dissolution of this marriage in another jurisdiction when this Court refused this defendant such relief previously requested under T.C.A. 36-802 because of his being in contempt, and this contempt having never been purged.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this defendant has been properly served with Process and Petition for Contempt filed March 10, 1975, and failed to appear and show cause as requested by the Court, and is therefore in contempt of instructions of this Court and subject to appropriate punishment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this defendant be and he is hereby restrained from taking any other action in any other jurisdiction, particularly in Indiana at this time, to pursue a dissolution of this marriage, which relationship remains under the jurisdiction of this Court as per previous orders, because any such actions of this defendant may cause irreparable damage and harm to the petitioner, Dorothy Annette Abney, and defendant shall have 10 days within which to appear and show cause why this injunction should not continue permanently.

Enter this 16 day of April, 1975.

/s/ (Ilegible)
Special Judge

Approved for Entry:

/s/ W. P. Ortale
Attorney for Petitioner

I hereby certify that I have mailed a copy of this judgment and injunction to defendant, James Harold Abney, 8828 El Monte Drive, Indianapolis, Indiana 46226 this 16th day of April, 1975.

/s/ W. P. Ortale

APPENDIX H

State of Indiana
County of Marion } ss.

In Re the Marriage of:
James Harold Abney
and
Dorothy Annette Abney
} In the Marion Circuit Court Cause Number C74-1181

Decree and Judgment of Dissolution of Marriage

(Filed July 29, 1978)

Comes now the petitioner, in person and by counsel, and comes now the respondent, in person and by counsel and it appearing to the Court that the respondent was duly served with process according to law as shown by the return thereof, which summons and return are in the words and figures as follows, to-wit:

(H.I.)

And it further appearing to the Court that this cause has been duly filed more than sixty days and that said cause is at issue, the same being now submitted to the court for trial and findings without the intervention of a jury.

And the Court, having heard the evidence on May 15, 1975 and having taken said matter under advisement and now being duly advised in the premises finds for the petitioner and that the allegations of the petitioner's complaint are true and that

the petitioner, being a continuous and bona fide resident of Marion County, Indiana, for six months immediately preceding the date of filing of the above cause of action, being October 8, 1974, and that he is entitled to a decree of dissolution of marriage from the respondent on the grounds therein alleged.

The Court further finds that the respondent is permanently disabled as defined by IC 31-1-11.5-9(c) and is entitled to maintenance; that the Court has no jurisdiction over the minor children of the parties or to provide for the support of said children; that the maintenance award of the Tennessee court is not a final judgment entitled to full faith and credit under the Constitution of the United States.

The Court further finds that the respondent is entitled to a money judgment against the petitioner in the sum of $10,390 for past due support and maintenance payments as ordered by the Tennessee courts.

The Court further finds that it is economically impossible for the petitioner to provide the medical care which would be beneficial to respondent; however, the parties having been legally separated for approximately thirteen years, it is unconscionable to enslave petitioner to a marital relationship which is clearly irretrievably broken.

The Court further finds that respondent would be eligible for Medicaid benefits if she has no other assets; the Court further finds that such insurance coverages which are presently in effect because of the marital relationship are not property rights.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the bonds of matrimony heretofore existing between the petitioner and the respondent herein be, and they hereby are, dissolved, and the parties are restored to the status of unmarried persons.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the respondent have judgment against the petitioner in the sum of $10,390.00 for past due support and maintenance as ordered by the Tennessee courts.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the petitioner, in addition to the valid Tennessee order of $375.00 per month, is ordered to pay respondent $125.00 per month beginning August 1, 1975 and on the first of each month thereafter during respondent's incapacity for the maintenance of respondent.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the respondent apply for applicable public Medicaid to cover her future medical expenses.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the petitioner is ordered to pay to respondent's attorneys the sum of $1,500.00 as and for final attorneys fees for services rendered to respondent to date; and that the costs of this action be paid the petitioner.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED THIS 29th DAY OF JULY, 1975.

/s/ J. PATRICK ENDSLEY
Judge, Marion Circuit Court

APPENDIX I

State of Indiana—Indianapolis, 46204
Clerk of the Supreme Court
and Court of Appeals
Billie R. McCullough, Clerk
217 State House
Telephone 633-5200

No. 2-1275A382

Dorothy Annette Abney v. James Harold Abney

You are hereby notified that the Court of Appeals has on this day Appellants petition for Rehearing DENIED. Buchanan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action. WITNESS my name and the seal of said Court, this 20th day of April, 1978.

/s/ BILLIE R. McCULLOUGH
Clerk Supreme Court and Court of Appeals

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-514

DOROTHY ANNETTE ABNEY,
Petitioner,

v.

JAMES HAROLD ABNEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Indiana

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TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying Writ 9

A. Matters waived on the record at trial may not be raised on appeal 9

B. The trial court gave full faith and credit to those portions of the decrees of the Tennessee Court entitled thereto, and declined to give full faith and credit to those portions of the decrees of the Tennessee Court not entitled to full faith and credit. Mr. Abney was not barred from proceeding to dissolve his marriage in the Marion Circuit Court by that court's failure to give the decrees of the Tennessee Court full faith and credit. While the Tennessee Court may have had continuing jurisdiction of the marriage of the parties, it did not have exclusive jurisdiction of the marriage, and there is no language in the decrees of the Tennessee Court, prior to the filing of Mr. Abney's Petition for Dissolution of Marriage in the Marion Circuit Court, expressly retaining or reserving in the Tennessee Court jurisdiction of the marriage of the parties 14

C. To the extent that it was applicable, the trial court applied the doctrine of comity. Mr. Abney didn't come to Indiana to escape the Tennessee orders. He sought from the Marion Circuit Court only two things. First, the dissolution of the marriage to Mrs. Abney. Second, that personal property which he acquired after the separation of the parties and after his return to his Indiana domicile and located in In-

diana, be awarded to him. Mr. Abney's position has consistently been that the orders and decrees of the Tennessee Court as to support and maintenance, custody, and disposition of the property rights of the parties, prior to his filing this action, are entitled to full faith and credit. And that he is bound by those determinations and orders. The Marion Circuit Court should not have refused to entertain this cause for the dissolution of the Abney marriage. Mr. Abney is a citizen of this state, is domiciled here, the Marion Circuit Court has jurisdiction of the subject matter, and it is the natural forum for Mr. Abney to seek a dissolution of his marriage 18

D. The Marion Circuit Court does not have inherent equitable discretion, after finding an irretrievable breakdown of the marriage, to deny a dissolution of the marriage. To do so would be contrary to statutory law and the express mandate of the legislature. However, even if the Marion Circuit Court did have such discretion, there was no abuse of discretion 21

E. Logically, it does not necessarily follow that if the trial court had no inherent equitable discretion to deny the dissolution of marriage after a finding of irretrievable breakdown, that the Indiana dissolution statute is unconstitutional on its face, or that the court was not required to and did not consider all of the incidents of the marriage. The trial court considered the incidents of the marriage in finding an irretrievable breakdown of the marriage and in making orders in addition to the valid Tennessee orders and decrees—Due process is not violated—Marital status and medical benefits are not property rights 23

Conclusion 27

Table of Authorities Cited

A. **Cases:**

Best v. State (1975), — Ind. App. —, 339 N.E.2d 82 13

Cox v. Cox (1975), — Ind. App. —, 322 N.E.2d 395 .. 26

Echterling v. Jack Gray Transport, Inc. (1971), 148 Ind. App. 415, 267 N.E.2d 198 .....23, 26

Estin v. Estin (1948), 334 U.S. 541, 92 LEd. 1561 17

Flora v. Flora (1975), — Ind. App. —, 337 N.E.2d 846, rehearing denied 25

Gleason v. Gleason (1970), 308 N.Y.S. 2d 347, 26 N.Y. 2d 28, 256 N.E.2d 513 25

Kniffen v. Courtney (1971), 148 Ind. App. 358, 266 N.E. 2d 72 .....17, 19

Riley v. Riley (1972), 271 So.2d 181 .....21, 22, 24

Ryan v. Ryan (1973), 277 So.2d 266 .....24, 25, 26

Shula v. Shula (1956), 235 Ind. 210, 132 N.E.2d 612 .. 26

Taylor v. United States (1974), 379 F. Supp. 642 ....25, 26

B. **Statutes and Rules:**

TR 8(D), Indiana Rules of Trial Procedure 13

IC 1971, § 31-1-11.5-3 .....21, 22

IC 1971, § 31-1-11.5-8 .....21, 22

IC 1971, § 31-1-11.5-9 21

C. **Pleadings and Judgments:**

Decree of Probate Court of Davidson County, Tennessee, dated May 25, 1964—Mrs. Abney's brief, Appendix C A-18-19

Decree of Probate Court of Davidson County, Tennessee, dated July 21, 1969—Mrs. Abney's brief, Appendix E A-28-29

Petition for Dissolution of Marriage, Marion Circuit Court, Indiana 15-16

Decree and Judgment for Dissolution of Marriage, Marion Circuit Court, Indiana—Mrs. Abney's brief, Appendix H A-43-45

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To the Supreme Court of Indiana

STATEMENT OF THE CASE

Dorothy Annette Abney and James Harold Abney were married on November 27, 1958. (R. p. 2) At the time of trial in the Marion Circuit Court on October 8, 1974, Mr. Abney was 45 years old (R. p. 205) and Mrs. Abney was 39 years old. (R. p. 210) Two children were born as a result of this marriage; Tamara Ruth Abney, age 15 and James Scott Abney, age 12. (R. p. 126, lines 14-16)

At the time of the parties marriage, Mr. Abney was approximately 28 years of age and Mrs. Abney was approximately

22 years of age. He had been in the United States Navy for approximately 10 years. (R. p. 177, line 20) At the time of the marriage, Mrs. Abney was mildly arthritic. (R. p. 161, line 10; p. 164, line 12; p. 188, line 20; p. 191, line 12)

In January 1964, the parties were residing at Key West, Florida. (R. pp. 127, 210) The parties separated in fact on January 18, 1964, after five years of marriage, when *Mrs. Abney, of her own volition, vacated the marital home* at Key West, Florida and took the two children to Tennessee while Mr. Abney was on a cruise with the Navy relative to the "Cuban crisis." (R. p. 127, lines 2-5; p. 128, lines 14-21; p. 210, lines 20-26; p. 228, lines 17-21) The parties have not lived and cohabited together since January 18, 1964. (R. p. 6, lines 6-7; p. 126, lines 2-11; p. 127, lines 2-5; p. 128, lines 14-21; p. 210, lines 15-26) The record is silent as to why she left the marital abode on January 18, 1964.

A careful search of the record fails to disclose the date Mrs. Abney filed her suit in Tennessee, however, a separate maintenance decree was entered in the Probate Court of Davidson County, Tennessee on May 25, 1964—four months after Mrs. Abney had left Mr. Abney. (R. p. 18) That decree ordered Mr. Abney to maintain and support Mrs. Abney and their two minor children until further order, gave Mrs. Abney the care, custody and control of the two minor children until further order, and ordered Mr. Abney to pay $300.00 per month to the clerk of the court for the separate maintenance and support of Mrs. Abney and the two minor children, said payments to be made on or before the 10th day of each month commencing with June 1964 and continuing until further ordered by the Court. (R. p. 18) (p. A-18, Mrs. Abney's brief)

The only other decree of the Probate Court of Davidson County, Tennessee appearing in the record in the case at bar, prior to the filing of the case at bar, was entered on July 21, 1969. It decreed that Mr. Abney's petition for absolute divorce be dismissed, that the alimony and support payments to Mrs. Abney and the two minor children be increased and that Mr. Abney pay $375.00 per month on or before the 10th day of each month beginning July 10, 1969 for support of Mrs. Abney and the minor children, until further orders of the Court, and awarded attorneys fees. (R. pp. 20-21) (p. A-28, Mrs. Abney's brief)

There have been other ancillary proceedings in the Probate Court of Davidson County, Tennessee since the first decree was entered in that Court on May 25, 1964.

At the time of filing his Petition for Dissolution of Marriage in the case at bar on October 8, 1974, the parties had not lived together for almost 11 years. (R. p. 210, lines 20-21)

On October 8, 1974, the husband, James Harold Abney, filed his Petition for Dissolution of Marriage seeking to dissolve his marriage to Dorothy Annette Abney, in the Marion Circuit Court, Cause Number C74-1181, in the State of Indiana (R. pp. 2-3)

Mr. Abney's petition alleged that he had been a resident of Marion County, Indiana for more than six months; that Dorothy Annette Abney resides in Nashville, Tennessee; that the parties were married on November 27, 1958; that the parties were separated on May 25, 1964; that two children were born as a result of the marriage, namely, Tamara Ruth Abney, age 14, and James Scott Abney, age 11, both of whom reside and are domiciled in Nashville, Tennessee; that the wife is not now pregnant; that the ground for dissolution of the marriage is the irretrievable breakdown of the marriage; and that personal property interests have been acquired by Mr. Abney, since the separation of the parties, and that the same should be decreed his sole and separate property. (R. p. 2)

Thereafter, on October 11, 1974, John T. Neighbours, Attorney at Law, Indianapolis, Indiana, entered his general appearance in this cause for Dorothy Annette Abney (R. p. 6).

On October 28, 1974, Dorothy Annette Abney filed a motion to dismiss contending that the court lacked jurisdiction of the subject matter, jurisdiction of the person of Mrs. Abney and improper venue (R. p. 8). On December 13, 1974, Mr. Abney filed a Memorandum In Opposition To Motion To Dismiss of Mrs. Abney (R. pp. 34-37). On January 17, 1975, Judge Endsley overruled the motion to dismiss filed by Mrs. Abney (R. p. 38).

On January 20, 1975, Mrs. Abney filed a Motion for Change of Venue (R. p. 40) and Mr. Abney field a Memorandum In Opposition To Motion For Change Of Venue on January 21, 1975 because Mrs. Abney's Motion for Change of Venue had not been timely filed (R. p. 42). Judge Endsley overruled Mrs. Abney's Motion for Change of Venue and set the cause for trial on February 10, 1975 at 1:30 p.m. (R. p. 43).

On January 24, 1975, Mrs. Abney filed her answer to Mr. Abney's petition in which she asserted that the Marion Circuit Court lacked jurisdiction of the subject matter, the person of Mrs. Abney, and improper venue. No other matters were alleged in the answer. (R. p. 44)

On January 24, 1975, Mrs. Abney filed a motion for continuance, which motion was approved by the trial court and the cause was reset for February 27, 1975. (R. pp. 46-50)

On January 29, 1975, Mrs. Abney filed Interrogatories and a Motion to Reduce Time to Answer Interrogatories. (R. pp. 51-56) The Court entered an Order on Motion to Reduce Time. (R. p. 58)

On February 14, 1975, Mr. Abney filed his answers to Mrs. Abney's interrogatories numbered 1 through 3 and his objections to Mrs. Abney's interrogatories numbered 4 through 24. (R. pp. 60-63)

On February 19, 1975, Mrs. Abney filed a Motion for Continuance of the trial set for February 27, 1975 (R. p. 65) and the Court on that same date entered an order continuing that trial. (R. p. 68)

Thereafter, the trial court overruled Mr. Abney's Objections to Interrogatories filed by Mrs. Abney and ordered Mr. Abney to answer the interrogatories within thirty days. (R. p. 69)

Thereafter, the trial court on February 20, 1975, set this cause for trial on May 15, 1975 to commence at 9:00 a.m. (R. p. 70)

On March 6, 1975, Mr. Abney filed his Answers to Interrogatories numbered 4 through 24. (R. pp. 72-73)

On April 21, 1975, James Harold Abney filed his Interrogatories directed to Mrs. Abney (R. pp. 79-83), his Motion to Produce (R. p. 77), and his Motion to Reduce Time to Answer Interrogatories and for Production of Documents. (R. p. 77) On April 22, 1975, an Order on Motion to Reduce Time was entered by the court. (R. p. 85)

On May 5, 1975, Mrs. Abney filed a Motion to Dismiss (R. p. 87) and the motion was overruled. (R. p. 92)

On May 7, 1975, Mrs. Abney filed her Answer to Petitioner's Interrogatories. (R. pp. 94-108)

On May 15, 1975, prior to trial, Mr. Abney filed a Motion for Judgment on the Pleadings (R. pp. 110-111), the Court heard argument on said motion (R. pp. 116-118), and the Court overruled said motion. (R. pp. 112, 118)

William P. Ortale, Esquire, of Nashville, Tennessee appeared for Mrs. Abney at the trial as co-counsel.

Thereafter, on May 15, 1975, the trial of this cause was commenced, was submitted on the merits, and evidence heard.

(R. pp. 116-246) On May 15, 1975, at the commencement of the trial, Mr. Neighbours stated, if this court is going to continue with its disposition, that it is not going to grant his legal arguments and proceed with the divorce matter, he will want to introduce evidence as to support under the Indiana Code that provides for an incapacitated spouse. (R. p. 117) The Court stated that the court had previously ruled on the questions involved in the matter of whether or not this Court had jurisdiction for the sole purpose of this dissolution of the marriage; that the Indiana law is quite clear that a citizen of this county, this state, who resides here for at least six months and in the county for three months prior to the time that he files the case, is eligible to have his case litigated on the issue of the dissolution of marriage; that the court has taken the position that it is the sole issue upon which it would consider this cause; that the court has taken the position that the matters relating to the real estate, support have been adjudicated and that the Tennessee rulings on that area are and will be given full faith and credit; they would be enforced in this court pursuant to law; that the issue of the dissolution of marriage under our statute is an open question as far as this court is concerned and this Court has so ruled; and that is the sole issue upon which this Court will consider the case; it will not go into the other matters; it will fully enforce the Tennessee decision in regards to property, in regards to custody, in regards to support, and in regards to maintenance. (R. pp. 123-124) At this point petitioner called his first witness, James Harold Abney. (R. p. 125) During the course of Mr. Neighbours' cross-examination of Mr. Abney, Mr. Neighbours stated to the court that Mrs. Abney has appeared in this Court and because she has appeared, she is, if this court is going to deny her legal assertions and proceed with granting a divorce, she is going to ask the court to invoke the Indiana Incapacitated Spouse statute. (R. p. 132, line 26; p. 133, line 5) Mr. Neighbours further stated that by Mrs. Abney's mere appearance in this court she's entitled legally to have this court order a support order under the Indiana Incapacitated Spouse statute; legally if she had not appeared in the State of Indiana all we would be discussing was whether the marriage was irretrievably broken; but now we're discussing the full spector of their marriage and all the ramifications of it due to her appearance. (R. p. 134, lines 11-22) The Court then asked Mr. Neighbours, is it your legal position then that you want to open the entire matter. (R. p. 134, lines 23-25) To that question Mr. Neighbours responded to the Court in the affirmative. (R. p. 134, lines 26 and 27) After more discussion on the record, the Court stated, that he thought Mrs. Abney's position is that by submitting to, by appearing in court, they've submitted themselves to the jurisdiction of the Court and that the Court presumed we're referring to section 31-1-11.5-9 under the dissolution of marriage code, subparagraph C; and if they submit themselves to the jurisdiction of the Court, which is the position that Mr. Neighbours is now taking, then clearly the Court can make any order; I suppose then it's up to the Court to determine whether or not they submitted themselves as a matter of fact or whether or not the question of res judicata applies. (R. p. 135, line 19; p. 136, line 17) After more discussion, the Court stated, Mr. Neighbours says the respondent is submitting herself to the jurisdiction of this Court on the issue of the entire marriage. (R. p. 137, lines 22-25) After further cross-examination by Mr. Neighbours, an argument pursuant to an objection, the Court stated, the parties have submitted themselves to the jurisdiction of the Court so the Court has jurisdiction at this moment; and that the Court understood Mr. Neighbours' position to be that the Court now has jurisdiction over the entire subject matter. (R. p. 142, lines 8-14)

During the course of the trial the parties made two stipulations of fact. First, that Dorothy Annette Abney is suffering from the condition of rheumatoid arthritis and that she is completely disabled and is unable to be gainfully employed. (R. p. 207) The second, that the insurance benefits provided for the dependent wife under the Champus Insurance, which is a

federal government program, will terminate upon the entry of a decree of dissolution. (R. p. 213)

At the conclusion of the trial, the Court took the cause under advisement (R. p. 249) and asked for post trial briefs from counsel.

On June 13, 1975, Mrs. Abney filed her Memorandum Brief and Request for Findings of Fact (R. pp. 251-260) and on June 19, 1975, Mrs. Abney filed her Addendum to Memorandum Brief and Request for Findings of Fact (R. pp. 266-268)

On June 19, 1975, Mr. Abney filed his Post Trial Brief. (R. pp. 270-307) and on July 3, 1975, Mr. Abney filed his Supplemental Post Trial Brief. (R. pp. 309-310)

Thereafter, the Court having taken said matter under advisement, made its findings and judgment. (R. pp. 311-313)

On August 6, 1975, Mrs. Abney filed her Motion to Stay. (R. pp. 318-319) On August 19, 1975, the trial court entered its Order to Stay. (R. p. 320)

On August 26, 1975, Mr. Abney filed his Report to Court advising the Court that he had received the Order to Stay on August 25, 1975 *and that James Harold Abney was married on August 16, 1975.* (R. p. 322)

REASONS FOR DENYING THE WRIT

A

Matters Waived on the Record at Trial May Not Be Raised on Appeal.

Mr. Abney filed his Petition for Dissolution of Marriage in the Marion Circuit Court on October 8, 1974. He sought only the dissolution of his marriage on the ground of irretrievable breakdown and that he be awarded personal property now in his possession. He sought no other relief. (R. p. 2)

This cause came on for trial on May 15, 1975. It was Judge Endsley's express intention to hear evidence only on those two issues. The following dialogue was had at the trial:

[During argument on Motion for Judgment on the Pleadings]

The Court: . . . There was a Motion for Judgment on the Pleadings filed this morning. Did you want to be heard on that?

Mr. Rogers: . . . We are here simply for a dissolution of marriage as I construe the pleadings . . .

Mr. Neighbors [sic]: . . . Additionally, if this Court is going to continue with its disposition, that it is not going to grant our legal arguments and proceed with the divorce matter, we will want to introduce evidence as to support under the Indiana Code, statute that provides for an incapacitated spouse . . . (R. p. 116, line 14—p. 117, line 18)

Mr. Rogers: . . . as to the matter of support and custody of the children. I won't argue that point, that's already been finally tried and decided by the Tennessee Court. But, it's not res judicata as to the dissolution of this

marriage. The only time that was raised, the subject went to the original separation decree in Tennessee, it was thrown out as a ruling on a demurrer or a motion to dismiss because grounds weren't stated in the pleading filed by Mr. Abney. The issue of this marriage as to whether it should be finally dissolved has never been tried on the merits by any court, to my knowledge, in any jurisdiction in the United States. And that issue is the sole remaining one to be tried this morning. All other matters as far as support, property settlement, custody of the children have all been decided by the Tennessee Court. The only one remaining for trial anywhere with regard to the marriage of these parties is whether or not the marriage should be finally dissolved. Thank you, Your Honor.

The Court: The Court has previously ruled on the questions involved in the matter of whether or not this Court has jurisdiction for the *sole purpose of this dissolution of the marriage*. The Indiana law is quite clear that a citizen of this county, this state, who resides here for at least six months and in the county for three months prior to the time that he files the case, is eligible to have his case litigated on the issue of the dissolution of marriage. *The Court has taken the position that is the sole issue upon which it would consider this cause.* It has taken the position that the matters relating to the real estate, support have been adjudicated and that the Tennessee rulings on that area are and will be given full faith and credit. They would be enforced in this court pursuant to law. *The issue of the dissolution of marriage under our statute is an open question as far as this Court is concerned and this Court has so ruled. And I again reiterate that is the ruling is the sole issue upon which this Court will consider the case.* It will not go into the other matters. It will fully enforce the Tennessee decision in regards to property, in regards to custody, in regards to support, and in regards to maintenance . . . (Emphasis added.) (R. p. 122, line 23—p. 124, line 24)

[During the cross-examination of Mr. Abney by Mr. Neighbours:]

Mr. Neighbors: Your Honor, Mrs. Abney has appeared in this Court and because she has appeared, she is, if this court is going to deny her legal assertions and proceed with granting a divorce, she is going to ask the court to invoke the Indiana incapacitated spouse statute. Therefore it's very pertinent to this matter whether Mr. Abney has provided for the children in the past, provided for Mrs. Abney in the past to reflect what their needs will be in the future . . .

Mr. Rogers: I would not, Your Honor, propose that you don't have jurisdiction to hear that when it's raised properly. But we're here on a verified petition for dissolution of marriage. Another court has jurisdiction of all other matters besides the statis [sic] of the marriage. If they come in here with a petition under another statute then that's the way they have to do it. . . . The only thing we can adjudicate this morning is what's before the Court which is a dissolution of the marriage.

Mr. Neighbors: Your Honor, if I may, by her mere appearance in this court she's entitled legally to have this court order a support order under the Indiana statute, the incapacitated spouse statute. Legally if she had not appeared in the State of Indiana then what Mr. Rogers says is true. And all we would be discussing was whether the marriage was irretrievably broken down. *But now we're discussing the full*

specter of their marriage and all the ramifications of it due to her appearance. (Emphasis added.)

The Court: *Is it your legal position then that you want to open up the entire matter?* (Emphasis added.)

Mr. Neighbors: *Yes, Your Honor, it is and that's evidenced by her appearance here . . .* (Emphasis added.)

The Court: I think their position is that by submitting to, by appearing in court, they've submitted themselves to the jurisdiction of the court and I presume we're referring to section 31-1-11.5-9 under the dissolution of marriage code, . . . And if they submit themselves to the jurisdiction of the court, which is the position that Mr. Neighbours is now taking, then clearly the court can make any order . . .

Mr. Rogers: . . . My point being that that issue has been tried. Her incapacity has been tried. It's been determined in Tennessee. She is incapacitated under the court decree in Tennessee. So, the only issue we have this morning, if you take our statute, everything in that statute has been decided in Tennessee except whether or not he's entitled to a final dissolution of marriage. . . .

The Court: . . . And Mr. Neighbours says the respondent is submitting herself to the jurisdiction of this court on the issue of the entire marriage, apparently. . . . (R. p. 132, line 26—p. 137, line 25)

The Court: No, the parties have submitted themselves to the jurisdiction of the court so the court has jurisdiction at this moment. As I understand Mr. Neighbours' position, the court now has jurisdiction over the entire subject matter by——

Mr. Rogers: That's always been his position, so I think the court understands his position. (R. p. 142, lines 8-17)

It is clear from the above dialogue, that Mrs. Abney, during the trial, had waived on the record any right to complain on appeal that the trial court failed to give full faith and credit to the Tennessee decrees, that the court failed to recognize the doctrine of comity, that Mr. Abney was barred from proceeding in this instant case at bar and any and all other matters raised by Mrs. Abney's motion to correct errors except, an abuse of discretion. Best v. State (1975), — Ind. App. —, 339 N.E.2d 82.

In addition, by application of Trial Rule 8(D), Indiana Rules of Trial Procedure, which provides:

> **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, except those pertaining to amount of damages, are admitted when not denied in the responsive pleading.

Mrs. Abney has admitted that the marriage is irretrievably broken and that property acquired after the separation and located in Indiana should be awarded to Mr. Abney. No part of the allegations of her answer were directed to Mr. Abney's complaint. (R. p. 44) By this admission Mrs. Abney cannot complain that her marriage was dissolved.

B

The Trial Court Gave Full Faith and Credit to Those Portions of the Decrees of the Tennessee Court Entitled Thereto, and Declined to Give Full Faith and Credit to Those Portions of the Decrees of the Tennessee Court Not Entitled to Full Faith and Credit. Mr. Abney Was Not Barred From Proceeding to Dissolve His Marriage in the Marion Circuit Court by That Court's Failure to Give the Decrees of the Tennessee Court Full Faith and Credit. While the Tennessee Court May Have Had Continuing Jurisdiction of the Marriage of the Parties, It Did Not Have Exclusive Jurisdiction of the Marriage, and There Is No Language in the Decrees of the Tennessee Court, Prior to the Filing of Mr. Abney's Petition for Dissolution of Marriage in the Marion Circuit Court, Expressly Retaining or Reserving in the Tennessee Court Jurisdiction of the Marriage of the Parties.

Prior to Mr. Abney's filing of his petition for dissolution of marriage in the Marion Circuit Court there were two decrees of the Probate Court of Davidson County, Tennessee, which are of record in the case at bar.

The first decree of the Probate Court of Davidson County, Tennessee appears on page 18 of the transcript and appendix C, p. A-18 of Mrs. Abney's brief.

This decree was entered May 25, 1964. There is no language in this decree expressly stating that that court has continuous jurisdiction of the parties and/or the subject matter, nor is there any express language which excludes any other court from exercising its jurisdiction, nor is there any express language reserving exclusive jurisdiction of the marriage or the parties or the children exclusively in that court, nor is there any language expressly retaining jurisdiction of that cause in that court. The verbage ". . . until further order of the court" is used twice and the verbage ". . . continuing until further order of the Court" is

used once. This verbage simply refers to the duration of that court's orders.

The second decree of the Probate Court of Davidson County, Tennessee, appearing of record in this cause, was entered on July 21, 1969, and appears in the transcript at page 20 through 21, and appendix E, p. A-28 of Mrs. Abney's brief. The verbage ". . . until further orders of this court" is found in that decree in only one place, on page 21 of the transcript and p. A-29, appendix E. It merely refers to the duration that Mr. Abney is to pay the support order. Nowhere in that decree does the Tennessee court expressly retain or reserve in that court exclusive jurisdiction of the marriage of the parties, nor does the court expressly say that it has continuing jurisdiction to the exclusion of any other court.

The first Tennessee decree, referred to above, ordered, adjudged and decreed that Mr. Abney maintain and support Mrs. Abney and their two children separately, that Mrs. Abney have the care, custody and control of the minor children, and ordered Mr. Abney to pay $300.00 per month for the separate maintenance and support of Mrs. Abney and the two minor children.

The second decree of the Tennessee Court, referred to above, denied Mr. Abney's petition for absolute divorce, increased the support payments to Mrs. Abney and the two minor children to $375.00 per month and awarded attorneys fees.

On October 8, 1974 Mr. Abney filed his petition for dissolution of marriage in Marion County, Indiana, which appears on page 2 of the transcript, and reads, omitting its formal parts, as follows:

> Comes now the petitioner, James Harold Abney, and for his cause of action for dissolution of marriage, says:
>
> 1. That the petitioner, James Harold Abney, resides at 8828 Elmonte Drive, Indianapolis, Marion County, Indi-

ana, and has been a resident of Marion County, Indiana for more than 6 months.

2. That the wife, Dorothy Annette Abney, resides at 128 Tallwood Drive, Nashville, Tennessee.

3. That the parties were married on November 27, 1958.

4. That the parties were separated on May 25, 1964.

5. That there were born as a result of this marriage 2 children, namely, Tamara Ruth Abney, age 14, and James Scott Abney, age 11, both of which children are residing in and domiciled in Nashville, Tennessee.

6. That to the best of your petitioner's knowledge the wife is not now pregnant.

7. That the ground for dissolution of marriage is the irretrievable breakdown of the marriage.

8. That personal property interests have been acquired by your petitioner, since the separation of the parties, and the same should be decreed to be his sole and separate property.

WHEREFORE, petitioner prays that the marriage of the parties be dissolved, that property now in his possession be decreed his sole and separate property, and for all other just and proper relief in the premises.

Mr. Abney simply sought a dissolution of his marriage and to be awarded personal property which was acquired after the separation. It should be noted that the separation date alleged in rhetorical paragraph 4 of his petition is the same date as the initial Tennessee court decree. Mr. Abney has maintained throughout this case that the Tennessee court orders were entitled to full faith and credit. From the dialogue which appears under Topic A in this brief, it is clear that Judge Endsley, up to the trial of this cause, was of the same opinion. It was Mr. Abney's position and Judge Endsley's position that

while the Tennessee court had continuing jurisdiction over the custody of the children, the support of the children, any disposition of property made by the Tennessee court, and the maintenance of Mrs. Abney were entitled to full faith and credit; but that the Marion Circuit Court had concurrent jurisdiction with regard to the final termination of the marriage of the parties. Estin v. Estin, (1948) 334 U.S. 541, 92 LEd. 1561; Kniffen v. Courtney, (1971) 148 Ind. App. 358, 266 N.E.2d 72. If Mr. Abney could have petitioned for an absolute divorce in Tennessee, he could petition for an absolute divorce or dissolution of his marriage in Indiana. Estin v. Estin, (1948) 334 U.S. 541, 92 LEd. 1561; Kniffen v. Courtney, (1971) 148 Ind. App. 358, 226 N.E.2d 72.

Mrs. Abney concedes that Tennessee law provides:

> . . . in Tennessee under their statute, once two years has elapsed from the granting of the separate maintenance, either spouse may, upon a showing parties have not reconciled, petition for absolute divorce. (R. p. 120, lines 22-27)

The Marion Circuit Court, following the *Estin* and *Kniffen* cases, Ibid, entered a decree in the case at bar on July 29, 1975, which decree appears in appendix H of Mrs. Abney's brief, p. A-43.

It is clear that the two decrees of the Tennessee court were not final judgments with regard to the final dissolution of the marriage relationship and the maintenance award of Mrs. Abney. Those portions of the Tennessee decrees were not entitled to full faith and credit under the Constitution of the United States. Judge Endsley gave the two decrees of the Tennessee court full faith and credit as regards its prior orders for support, found an arrearage in that support, and gave Mrs. Abney a judgment against Mr. Abney for the arrearage. Judge Endsley, in his decree further recognizing and giving full faith and credit to the Tennessee decrees, specifically stated in his de-

cree: ". . . in addition to the *valid Tennessee order* of $375.00 per month, he is ordered to pay respondent [Mrs. Abney] $125.00 per month beginning August 1, 1975 and on the first of each month thereafter during respondent's incapacity for the maintenance of respondent." [Emphasis added.]

It is also clear, that Mr. Abney was not barred from proceeding to dissolve his marriage in the Marion Circuit Court by that court's failure to give the decrees of the Tennessee court full faith and credit. Under the foregoing authorities the restraining order emanating from the Tennessee court was not a final judgment entitled to full faith and credit.

C

To the Extent That It Was Applicable, the Trial Court Applied the Doctrine of Comity. Mr. Abney Didn't Come to Indiana to Escape the Tennessee Orders. He Sought From the Marion Circuit Court Only Two Things. First, the Dissolution of the Marriage to Mrs. Abney. Second, That Personal Property Which He Acquired After the Separation of the Parties and After His Return to His Indiana Domicile and Located in Indiana, Be Awarded to Him. Mr. Abney's Position Has Consistently Been That the Orders and Decrees of the Tennessee Court as to Support and Maintenance, Custody, and Disposition of the Property Rights of the Parties, Prior to His Filing This Action, Are Entitled to Full Faith and Credit. And That He Is Bound by Those Determinations and Orders. The Marion Circuit Court Should Not Have Refused to Entertain This Cause for the Dissolution of the Abney Marriage. Mr. Abney Is a Citizen of This State, Is Domiciled Here, the Marion Circuit Court Has Jurisdiction of the Subject Matter, and It Is the Natural Forum for Mr. Abney to Seek a Dissolution of His Marriage.

Much of the argument of Mr. Abney in Topic B of this brief is applicable to the instant argument and is incorporated here by reference.

Kniffen v. Courtney, (1971) 148 Ind. App. 358, 266 N.E. 2d 72, at page 75 holds:

> However, the Courts of Indiana are not obligated to give the decree any further effect than is the state rendering the decree. Thus those portions of the decree *which are not final*, i.e., custody and support fall within the doctrine of comity and if valid in the state granting the divorce are valid in every other state. (Emphasis added.)

And at page 76, the Court went on to say:

> It appears on the face of appellant's complaint that the Court of Kentucky has the power to modify the support order; therefore, the courts of Indiana may modify the support order if conditions presented to the Court warrant such action.

As discussed under the proceding section of argument in this brief, the Tennessee court could have granted an absolute divorce upon the petition of either Mr. or Mrs. Abney. On the basis of the foregoing authority the Marion Circuit Court, upon petition of either Mr. or Mrs. Abney could dissolve this marriage.

The Marion Circuit Court, having found an irretrievable breakdown of the marriage, dissolved the marriage. The Marion Circuit Court recognized the doctrine of comity in its decree when it granted a money judgment in favor of Mrs. Abney against Mr. Abney for $10,390.00 for past due support and maintenance payments as ordered by the Tennessee court and when it ordered an increase of $125.00 per month over the valid Tennessee order for $375.00 per month.

Mr. Abney did not come to Indiana to escape the Tennessee orders. Nowhere in this record is there any evidence whatsoever that Mr. Abney ever lived in the State of Tennessee. There is no evidence in this record of any escape. There is nothing in

this record that shows that Mr. Abney at any time tried to escape from the Tennessee orders. Mrs. Abney in her brief when stating that Mr. Abney came to Indiana to escape the Tennessee orders makes no citation to the record of where such fact can be found.

Nowhere in this record does Mrs. Abney cite nor can it be found where Mr. Abney has sought to have any decrees or orders emanating from the State of Tennessee declared invalid or unenforceable.

All that Mr. Abney has sought in the way of relief by filing his petition for dissolution of the marriage is that his marriage be dissolved and that after acquired property be awarded to him. (R. p. 2) Mr. Abney's position has consistently been that the orders and decrees of the Tennessee court as to support and maintenance, custody, and disposition of the property rights of the parties, prior to his filing this action, are entitled to full faith and credit and/or that he is bound by those determinations and orders. (R. p. 36, last sentence; p. 37, first sentence; p. 122, lines 22-23, line 21; p. 129, lines 6-10; p. 130, lines 7-9; p. 132, lines 18-25; p. 133, line 24; p. 134, line 4; p. 135, lines 4-8; p. 137, lines 14-15; p. 143, lines 20-23; p. 283-287)

The Marion Circuit Court should not have refused to entertain this cause for the dissolution of the Abney marriage. Mr. Abney is a citizen of Indiana, is domiciled there, the Marion Circuit Court has jurisdiction of the subject matter, and it is the natural forum for Mr. Abney to seek a dissolution of his marriage. The record is silent of any facts refuting the foregoing statement and Mrs. Abney cites no authority to the contrary.

D

The Marion Circuit Court Does Not Have Inherent Equitable Discretion, After Finding an Irretrievable Breakdown of the Marriage, to Deny a Dissolution of the Marriage. To Do So Would Be Contrary to Statutory Law and the Express Mandate of the Legislature. However, Even if the Marion Circuit Court Did Have Such Discretion, There Was No Abuse of Discretion.

IC 1971, § 31-1-11.5-3 provides in part:

> There shall be the following causes of action: (a) dissolution of marriage *which shall be decreed* upon a finding by a court of one of the following grounds, and no other: (1) Irretrievable breakdown of the marriage. . . . [Emphasis added.]

The above quoted provision uses mandatory words to the effect that, after the Court finds that there has been an irretrievable breakdown, the Court has no discretion but to decree the dissolution of the marriage. This conclusion is support in IC 1971, § 31-1-11.5-8 which provides in pertinent part:

> . . . Upon the final hearing: the court shall hear evidence and if it finds that the material allegations of the petition are true, either enter a dissolution decree . . . or if the court finds that there is a reasonable possibility of reconciliation, the court may continue the matter . . .

The court has a choice of two alternatives, i.e., to either enter a decree dissolving the marriage or, if there is a reasonable possibility of reconciliation, to continue the matter for reconciliation. No other choice is given. The Court only has discretion to deny the dissolution only where it has found there is a possibility of reconciliation. It has no discretion to deny the dissolution where it has found that there is an irretrievable breakdown of the marriage. Riley v. Riley (1972), 271 So.2d 181, 183-4. Further support for this conclusion is found in IC 1971, § 31-1-11.5-9, which reads in pertinent part:

> In an action pursuant to section 3 (a) [subsection (a) of 31-1-11.5-3] when the Court has made the findings required by section 8 (a) [subsection (a) of 31-1-11.5-8], the Court *shall enter a dissolution decree* . . . [Emphasis added.]

Again the same mandatory words are used. Once the court has made the finding that there has been an irretrievable breakdown, there seems to be no discretion but to enter the decree of dissolution.

Nowhere in the record of this case does Mrs. Abney deny, question or challenge that the marriage has been irretrievably broken or that there is even the remotest possibility of a reconciliation of these parties.

Prolonging a defunct marriage is not one of the stated purposes of the Indiana dissolution of marriage act.

> While the power of the State should be exerted to preserve the marriage if it can be preserved, it should not perpetuate a legal relationship which has or will cease to exist in fact. Riley v. Riley (1972), 271 So.2d 181, 184.

It is the opinion of Mr. Abney that when the court made a finding that there was an irretrievable breakdown of this marriage, the court had no discretion but to grant a dissolution of the marriage.

However, even if the Marion Circuit Court did have such discretion, there was no abuse of discretion in the court dissolving this marriage and failing to deny the dissolution.

Mr. and Mrs. Abney were married on November 27, 1958. (R. p. 2) The parties separated in fact on January 18, 1964, after five years of marriage, when Mrs. Abney *voluntarily vacated* the marital home at Key West, Florida and took the two children of the parties to Tennessee while Mr. Abney was on a cruise with the Navy. (R. p. 227, lines 2-5; p. 128, lines 14-21;

p. 210, lines 20-26; p. 28, lines 17-21) The parties have not lived and cohabited together since January 18, 1964. (R. p. 6, lines 6-7; p. 126, lines 2-11; p. 127, lines 2-5; p. 128, lines 14-21; p. 210, lines 15-26) The record is silent as to why Mrs. Abney left the marital abode on January 18, 1964. Mr. Abney testified that there was no chance his marriage could be reconciled and he had no intent whatsoever to live with Dorothy Annette Abney at any time ever again in the future. (R. p. 177, lines 23-27) The parties have not lived together for almost eleven years. (R. p. 210, lines 20-21)

It would have defied all rationality for the court to have perpetuated this marital relationship. The decision of the trial court comes to this Court clothed with the presumption that a correct result was reached and the burden is upon Mrs. Abney to overcome that presumption. Echterling v. Jack Gray Transport Inc. (1971), 148 Ind. App. 415, 267 N.E.2d 198. Mrs. Abney has not met this burden. She has come forth with no facts showing that this marriage is not irretrievably broken.

E

Logically, It Does Not Necessarily Follow That if the Trial Court Had No Inherent Equitable Discretion to Deny the Dissolution of Marriage After a Finding of Irretrievable Breakdown, That the Indiana Dissolution Statute Is Unconstitutional on Its Face, or That the Court Was Not Required to and Did Not Consider All of the Incidents of the Marriage. The Trial Court Considered the Incidents of the Marriage in Finding an Irretrievable Breakdown of the Marriage and in Making Orders in Addition to the Valid Tennessee Orders and Decrees—Due Process Is Not Violated—Marital Status and Medical Benefits Are Not Property Rights.

Judge Endsley had equitable discretion in determining whether or not there had been an irretrievable breakdown of the mar-

riage. In exercising this discretion he was able to and did consider all of the incidents of the marriage. In fact, his decree encompasses all incidents of the marriage. The evidence in this cause, over the objections continuously of Mr. Abney, considered all incidents of the marriage. Mrs. Abney in her brief fails to point out anything in the record incidental to this marriage that was not considered by the submission of this cause on May 15, 1975. Mrs. Abney was permitted during the trial to submit evidence as to all incidents of the marriage from the date of the marriage, and even prior thereto, right up to the day of trial. If Judge Endsley did not have discretion to inquire into all aspects and incidents of this marriage, and in fact did not do so, Mrs. Abney is free to point out in her reply brief, what particular aspects and incidents of this marriage were not considered by Judge Endsley and upon which no evidence was submitted, or an aspect of the marriage which Judge Endsley refused to hear. It seems to Mr. Abney that Judge Endsley went far and beyond the narrow issue submitted for trial, at Mrs. Abney's request, and heard all evidence which Mrs. Abney desired to bring forth.

It escapes all logic, for Mrs. Abney to put forth the argument that Judge Endsley had no discretion in determining whether or not the marriage had suffered an irretrievable breakdown.

Once there is a finding that the marriage is irretrievably broken, it hardly seems logical, to deny a dissolution of the marriage and perpetuate a hopeless relationship. Riley v. Riley (1972), 271 So.2d 181, 184; Ryan v. Ryan (1973), 277 So.2d 266.

In any event, there was no abuse of discretion, and there was no denial of due process with regard to any property rights of Mrs. Abney in the medical benefits provided by the United States government through or because of Mr. Abney's military service or social security benefits which may be available to Mrs. Abney in the future.

These matters are not property rights. They were not Mrs. Abney's property. *Veterans benefits are gratuities and establish no vested rights in the recipient.* Taylor v. United States (1974) 379 F. Supp. 642.

As between a husband and wife, there is no constitutional provision protecting marriage itself from legislative control, by general law, upon such terms as public policy may dictate; sovereign power may, by general enactment, regulate and mold their relative rights at pleasure. Flora v. Flora (1975), — Ind. App. —, 337 NE2d 846, rehearing den. A dissolution of marriage law abolishing former grounds for divorce and providing as a ground for dissolution that the marriage is irretrievaby broken does not impair the marriage contract *nor adversely affect property rights of the parties.* Ryan v. Ryan (1973), — Fla. —, 277 So.2d 266. Marriage is not a contract within the constitutional provision prohibiting impairment by the states of the obligation of contract; thus rights growing out of the marriage relationship may be modified or abolished without violating provisions of Federal or State Constitutions which forbid taking of life, liberty, or property without due process of law. Marital rights are inchoate or contingent and may be taken away by legislation before they vest; thus any adverse effect on a wife's social security, pension rights, inheritance rights and right in the marital status itself after granting a separation judgment or decree does not offend due process or equal protection. Gleason v. Gleason (1970), 308 N.Y.S.2d 347, 26 N.Y.2d 28, 256 N.E. 2d 513.

Due process is basically met upon a provision for notice and an opportunity to be heard. Ryan v. Ryan (1973), — Fla. —, 277 So.2d 266.

It must be remembered that Mrs. Abney voluntarily left Mr. Abney on January 18, 1964. The parties had only been married at that time for five years. The parties have lived apart for approximately eleven years. Mrs. Abney, if she deems her social

security or medical benefits through her husband as property rights, voluntarily put these matters in jeopardy when she left her husband in Florida in 1964 and filed her action in Tennessee.

Mr. Abney did not have his pension at the time that Mrs. Abney voluntarily left him; it was not vested then, if it ever vests. If anything, this pension is merely an *earned gratuity* by virtue of Mr. Abney's military service. It is not a "right" which he has. It is wholly dependent upon the whim of Congress. It is not property; it is not a property right. It can be terminated by the Congress at the will of the Congress, increased, decreased or terminated altogether, as was recently done with some of the benefits under the G. I. Bill of Rights. It is not an asset that can be sold, transferred, conveyed or assigned or otherwise alienated or encumbered. It is akin to a dower right or a courtesy right. Ryan v. Ryan (1973), 277 So. 2d 266. The same is true regarding medical benefits.

In addition it appears that Mrs. Abney received all of the property of the marriage at the time of the separation in Key West, Florida from the Tennessee court. Mr. Abney has only acquired property in Indiana after the separation.

The decision of the trial court comes to this Court clothed with the presumption that a correct result was reached and the burden is upon appellant to overcome that presumption. Echterling v. Jack Gray Transport, Inc. (1971), 148 Ind. App. 415, 267 N.E. 2d 198. It is only the abuse of discretion which is reviewable on appeal and the presumption in favor of the correct action of the trial court is one of the strongest presumptions applicable to the consideration of a case on appeal. Shula v. Shula (1956), 235 Ind. 210, 132 N.E.2d 612; Cox v. Cox (1975), — Ind. App. —, 322 N.E.2d 395.

Petitioner fails to cite any authority that medical benefits derived from a career in the military service or future social security benefits are property rights. They, in fact and in law, are not. Taylor v. United States (1974), 379 F. Supp. 642.

CONCLUSION

Mr. Abney submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served a copy of the foregoing brief upon John W. Kelley and William P. Ortale, ORTALE, KELLEY, HERBERT & CRAWFORD, Attorneys at Law, 23rd Floor, Life & Casualty Tower, Nashville, Tennessee 37219, this 6th day of December, 1978, by mailing a copy thereof by United States Mail.

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